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

United States Courts
Southern District of Texas
FILED
NOV 05 2002
Michael N. Milby, Clerk

MARK NEWBY,	:	
Plaintiff,	:	Civil Action No. 01-CV-3624 (Consolidated)
v.	:	
ENRON CORPORATION., et al.,	:	
Defendants.	:	

RESPONSE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ENRON CORP., ET AL., TO THE OUTSIDE DIRECTORS' MOTION FOR PROTECTION FROM BANKRUPTCY RULE 2004 SUBPOENAS

The Official Committee of Unsecured Creditors (the "Committee") of Enron Corp. and its affiliated debtors and debtors-in-possession (collectively, "Enron" or the "Debtors"), submit this Response to the Motion for Protection From Bankruptcy Rule 2004 Subpoenas ("Motion") filed by the Outside Directors of Enron (collectively, "Outside Directors").[1] The Bankruptcy Rule 2004 subpoenas at issue were served by the Committee in connection with the Enron Bankruptcy proceedings pending in the United States Bankruptcy Court for the Southern District of New York pursuant to an order entered by the Honorable Arthur Gonzalez.

This Court should deny the Outside Directors' Motion for the following reasons:

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[1] Although not defined in the Motion, the term "Outside Directors" appears to refer to Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LaMaistre, John Mendelsohn, Jerome J. Meyer, Paul V. Ferraz Pereira, Frank Savage, John Wakeham, Charles E. Walker, Bruce Willison and Herbert S. Winokur, Jr. (*See* Motion at 19 (signature block of counsel).)

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- The Committee issued the Bankruptcy Rule 2004 subpoenas on the Outside Directors pursuant to an Order properly entered by the Bankruptcy Court for the purpose of fulfilling its statutory duty of investigating matters affecting the administration of the bankruptcy estate;

- The "pending litigation" limitation does not apply to the subpoenas served on the Outside Directors because the Committee has not asserted any claims against the Outside Directors and they are not parties to the Committee's lawsuit against certain of Enron's former officers, directors and employees;

- The Committee is not a party to the ongoing *Newby* action, and, therefore, the statutory stay of discovery applicable to the *Newby* action does not preclude the Committee from serving the Outside Directors with Bankruptcy Rule 2004 subpoenas; and,

- The Outside Directors' blanket assertions of the narrow attorney-client privilege and work product doctrine are insufficient to support a motion to quash.

BACKGROUND

Commencing on December 2, 2001 (the "Petition Date"), the Debtors filed voluntary petitions for relief under the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"). The Debtors continue to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

On December 12, 2001, the United States Trustee appointed the Committee, which appointment was amended from time to time thereafter. The Committee represents the interests of all of Enron's unsecured creditors in these bankruptcy cases. *See In re Victory Mkts., Inc.*, 195 B.R. 9, 16 (Bankr. N.D.N.Y. 1996). Among other things, the Committee is charged with investigating the Debtors' assets and liabilities and the operation of its businesses, and participating in the formulation of the Debtors' plan of reorganization. *See* 11 U.S.C. § 1103(c). Pursuant to 28 U.S.C. § 1334, the United States Bankruptcy Court has exclusive jurisdiction over that investigation including, among other things, authorizing the issuance of Bankruptcy Rule 2004 subpoenas.

By motion in the Bankruptcy Court, the Committee sought and was granted authority to pursue the examination and production of documents from certain former Enron officers, directors and employees. (*See* Motion of The Committee for Order, Under 11 U.S.C. § 1103(c) and Fed. R. Bankr. P. 2004, Directing Examination of and Production of Documents from Certain Former Enron Officers, Directors and Employees, Exhibit ("Ex.") A.) On September 19, 2002, Judge Gonzalez granted the Committee's motion, and authorized the issuance of over fifty-five (55) Bankruptcy Rule 2004 subpoenas, including the sixteen (16) at issue in the Motion. (*See* Judge Gonzalez's Order of Sept. 19, 2002, at 3, Ex. B.)[2]

On October 16, 2002, the Outside Directors filed the Motion in this Court seeking to quash the Committee's Bankruptcy Rule 2004 subpoenas that were served upon them. Although the Outside Directors have improperly and inexplicably captioned their Motion as arising in the *Newby* action, the subpoenas directly arise out of the Committee's ongoing investigation in the bankruptcy case and are in no way related to the *Newby* action, or any other action pending in this or any other Court.[3]

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[2] On a procedural note, Judge Gonzalez, who presides over the Enron bankruptcy, authorized the subpoenas and retained jurisdiction to resolve any "disputes arising under or related to th[e] Order, including discovery disputes that may arise between or among the parties . . . . " (*See* Judge Gonzalez's Order, at 3, 5-6, Ex. B.) Therefore, Judge Gonzalez is the appropriate judge to rule on the substantive issues raised in Outside Directors' Motion. *See In re Texas International Co.*, 97 B.R. 582, 589 (Bankr. C.D. Cali. 1989) (bankruptcy judge issuing Rule 2004 subpoenas more appropriate to issue rulings on motion to quash). Nonetheless, this Response does address the substantive issues raised in the Motion.

[3] The Outside Directors' assertion that the Judicial Panel on Multidistrict Litigation ("JPML") has determined that the United States District Court for the Southern District of Texas "should supervise and coordinate all discovery in federal actions arising from Enron's collapse" (Motion at 1) is belied by the fact that Enron and the Committee are, by definition, parties to the bankruptcy proceedings before Judge Gonzalez. As discussed below, the Committee's investigation – and the discovery it must pursue as part of that investigation – are within the exclusive jurisdiction of the Bankruptcy Court. Nothing in the JPML order consolidating the *Newby* action affects the Bankruptcy Court's exclusive jurisdiction.

ARGUMENT

The Outside Directors' attempt to avoid their obligations to comply with the Committee's subpoenas is without merit and their Motion should be denied. Despite the incorrect premise of the Outside Directors' Motion, the Committee's issuance of Bankruptcy Rule 2004 subpoenas is not an effort to "circumvent" applicable discovery rules in this or any other pending lawsuit. (*See* Motion at 7, 8, 11, 13-15.) Rather, the Committee's service of Bankruptcy Rule 2004 subpoenas on the Outside Directors and others is a judicially sanctioned discovery method that is both permissible and necessary to facilitate the Committee's investigation as part of the administration of the Enron bankruptcy cases.

The validity of the Committee's Bankruptcy Rule 2004 subpoenas is not undermined by the Committee's lawsuit against certain former Enron officers, directors, and employees because the Outside Directors are neither parties to, nor affected by, the action. Nor is the Committee's use of Bankruptcy Rule 2004 subpoenas to investigate claims related to the bankruptcy proceeding precluded by the stay of discovery in the *Newby* action. Because the Committee is not a party to *Newby*, the *Newby* discovery stay simply does not apply to the Committee's ongoing investigation. Finally, the Outside Directors' blanket assertions of the narrow attorney-client privilege and the work product doctrine are insufficient grounds for a motion to quash.

I. The Bankruptcy Rule 2004 Subpoenas Are Permissible and Necessary Discovery Tools For Investigating Matters Related to the Enron Bankruptcy.

Bankruptcy Rule 2004 permits the Bankruptcy Court, upon a motion of any party in interest, to order the examination of any entity, including third parties (such as the Outside Directors), so long as the examination is related to matters that may affect the administration of the debtor's estate. *See In re Enron*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002) (on motion of a

party in interest the court may order Bankruptcy Rule 2004 subpoenas). "Rule 2004 examinations are appropriate for revealing the nature and extent of the bankruptcy estate, . . . , and for 'discovering assets, examining transactions, and determining whether wrongdoing has occurred.'" *Id.* at 840 (citing *In re Strecker*, 251 B.R. 878, 882 (Bankr. D. Colo. 2000)). The scope of Bankruptcy Rule 2004 is "virtually unlimited," *In re Kipp*, 86 B.R. 490, 491 (Bankr. W.D. Tex. 1988), for the purpose of allowing investigation into the "acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the estate." *In re Enron*, 281 B.R. at 840. Even the cases cited by the Outside Directors expressly provide for the "[the] examination of any entity . . . on any matter which may affect the debtor's right to discharge." *In re Kipp*, 86 B.R. at 491. *See also Snyder v. Society Bank*, 181 B.R. 40, 41 (Bankr. S.D. Tex. 1994) ("Rule 2004 affords creditors and debtors the broad rights of examination."); *In re Bennett Funding Corp.*, 203 B. R. 24, 29 (Bankr. N.D.N.Y. 1996) (third party who possess knowledge related to bankruptcy proceeding is subject to subpoena); *Szadkowski v. Sweetland*, 198 B.R. 140,141 (Bankr. D. Md. 1996) (authorizes a broad fishing expedition for purposes of obtaining information related to administration of bankruptcy estate); *In re 2435 Plainfield Avenue, Inc.*, 223 B.R. 440, 456 (Bankr. D. N.J. 1998) (Rule 2004 examination is a broad investigation into financial affairs of the debtor); *In re French*, 145 B.R. 991, 992 (Bankr. S.D.S.D. 1992) (Bankruptcy Rule 2004 designed to be quick inquiry into general matters of case administration).

Because the Bankruptcy Rule 2004 subpoenas at issue in the Motion relate to the Enron bankruptcy, there can be no dispute that they are permissible and necessary discovery tools.

A. The "Pending Litigation" Limitation to Bankruptcy Rule 2004 Does Not Apply to the Bankruptcy Rule 2004 Subpoenas Issued by the Committee.

In certain circumstances, if collateral proceedings have been commenced, a "pending litigation" limitation may apply to prevent the Bankruptcy Rule 2004 subpoenas from being used to avoid procedural safeguards and limitations on discovery afforded to litigants in those collateral proceedings. Because, however, the Outside Directors are not parties to any collateral proceedings that the Committee has commenced related to the Enron bankruptcy, that limitation does not apply to them.

At bottom, the Outside Directors' Motion rests solely on the erroneous contention that because the Committee filed a lawsuit in Montgomery County, Texas (since removed to this Court) asserting claims related to the collapse of Enron, the pending litigation limitation prohibits the Committee from issuing Bankruptcy Rule 2004 examinations relating to matters affecting the Enron bankruptcy. The Outside Directors are wrong. Because they are neither parties to nor affected by the Committee's pending action against certain of Enron's former officers, directors and employees, the "pending litigation" limitation does not protect the Outside Directors or otherwise excuse them from responding to the Committee's Bankruptcy Rule 2004 subpoenas.

Seeking to avoid their obligations under Bankruptcy Rule 2004, the Outside Directors stretch the "pending litigation" limitation to Bankruptcy Rule 2004 beyond recognition. The "pending litigation" limitation to Bankruptcy Rule 2004 discovery applies only when a party makes use of the liberal Bankruptcy Rule 2004 discovery device in a related adversary proceeding to circumvent the more restrictive discovery procedures under the Federal Rules. *See In re Blinder, Robinson & Co.*, 127 B.R. 267, 275 (Bankr. D. Colo. 1991)

(Bankruptcy Rule 2004 allows broad discovery versus more restrictive Federal Rules of Civil Procedure).

The "pending litigation" limitation, however, only applies to "entities affected by the adversary proceeding." *In re Buick*, 174 B.R. 299, 305 (Bankr. D. Colo. 1994). *See also International Fibercom, Inc.* 283 B.R. 290, 292 (Bankr. D. Az. 2002) (pending litigation limitation does not apply if Bankruptcy Rule 2004 subpoenas relate to another matter); *In re Buick*, 174 B.R at 305 (parties unaffected by pending litigation cannot avoid bankruptcy Rule 2004 discovery obligation) (citing *In re Table Talk, Inc.*, 51 B.R. 143 (Bankr. D. Mass. 1985) (Bankruptcy Rule 2004 examinations not precluded by possibility of future "non-core" proceedings arising from same facts)). Here, the "pending litigation" limitation to Bankruptcy Rule 2004 subpoenas is inapplicable because the Outside Directors are not parties to the Committee's lawsuit against certain of Enron's former officers, directors and employees. Nor are the Outside Directors otherwise affected by that lawsuit, as demonstrated below.

B. The Outside Directors Are Not Affected by the Committee's Lawsuit and Remain Subject to the Bankruptcy Rule 2004 Subpoenas.

The Outside Directors claim that they will somehow be affected by the Committee's pending lawsuit – despite the fact that none of the Outside Directors are parties to that action. In each case cited by the Outside Directors to support their position, (*see* Motion at 7-11), the Bankruptcy Rule 2004 subpoenas at issue were served on the same parties to a collateral proceeding in an apparent effort to side-step the procedural safeguards of the discovery rules applicable to that proceeding. *See e.g. In re Synder*, 181 B.R. at 41 (adversarial proceeding against party to bankruptcy proceeding). The same simply is not true here.

Rather, as they expressly concede, the "Outside Directors are not parties to the [pending] lawsuit." (Motion at 10.) Nonetheless, the Outside Directors ask the Court to

undercut a "basic discovery device in bankruptcy cases," *In re Blinder, Robinson*, 127 B.R. at 276, and effectively, thwart the Committee's ongoing investigation despite the fact that the Committee has not asserted any claims against them. The Court should decline that invitation.

The law is clear that persons who are not affected by the adversary proceeding "***should not*** be able to avoid examination under Fed. R. Bankr. P. 2004." *In re Bennett*, 203 B.R. at 29 (emphasis added). The Outside Directors claim that because the Bankruptcy Rule 2004 subpoenas seek information *relevant to* and *affecting* the Committee's lawsuit, they too are somehow affected by that lawsuit. (*See* Motion at 10-12.) But the Outside Directors' conclusion does not follow from their premise. Even the Outside Directors do not dispute that the information sought in the Bankruptcy Rule 2004 subpoenas relates *directly* and *distinctly* to matters affecting the Enron bankruptcy. That the information sought by the Committee may also have some relevance to its lawsuit is not a proper basis upon which the subpoenas should be quashed. S*ee In re International Fibercom*, 283 B.R. at 290 (overlap of issues in pending litigation discovery does not preclude use of broader Bankruptcy Rule 2004 subpoenas). Rather, the Bankruptcy Rule 2004 discovery that Judge Gonzalez authorized remains a legitimate, permissible and necessary "pre-litigation device" for obtaining relevant information related to the administration of the Enron bankruptcy estate. *See In re Szadkowski v. Sweetland*, 198 B.R. at 141. *See also In re Buick*, 174 B.R. at 305 (Bankruptcy Rule 2004 subpoenas valid "[e]ven if the issues to be raised in the Bankruptcy Rule 2004 examinations are related to the issues raised . . . in the adversary proceedings").

The Outside Directors mistakenly rely on *In re Bennett* and *In re 2435 Plainfield* as support for their contention that if the discovery sought under the Bankruptcy Rule 2004 subpoenas overlaps, even in part, with potential discovery in the Committee's lawsuit, the Outside Directors should be exempted from complying with the Committee's subpoenas.

(Motion at 11-12.) In *In re Bennett*, the court clearly recognized that "entities which are not affected by the adversary proceeding should not be able to avoid examination under Fed. R. Bankr. P. 2004." 203 B.R. at 29. The sole reason that the *In re Bennett* court prohibited the use of Bankruptcy Rule 2004 subpoenas was because "[i]t appear[d] that the parts and subject matter of the [adversary proceeding] [were] not easily separable" from the information sought in the Bankruptcy Rule 2004 subpoenas. *Id.* Similarly, in *In re 2435 Plainfield*, the debtor brought an adversary proceeding in the bankruptcy court and used Bankruptcy Rule 2004 subpoenas to obtain information directly "addressed by the adversary filing." 223 B.R. at 456.

Here, by contrast, the Committee *did not* name any of the Outside Directors as parties to an adversarial proceeding and *has not* asserted any claims against the Outside Directors. As such, the Outside Directors are not "affected by [any] adversary proceeding" brought by the Committee. *See In re Bennett*, 203 B. R. at 24. Although there may be some overlap of issues in the litigation and the Committee's ongoing investigation of the bankruptcy, the requests made in the subpoenas relate to different discovery from entirely different parties, and are, therefore, permissible. *See In re Buick*, 174 B.R. at 305.

Moreover, prohibiting Bankruptcy Rule 2004 discovery by the Committee will foreclose discovery of matters relating to the Enron bankruptcy, which is antithetical to the very purpose and intent of both Bankruptcy Rule 2004 *and* the "pending litigation" limitation. As such, the Outside Directors "do not require the greater protections afforded under the Federal Rules," *In re Buick*, 174 B.R. at 305, *but* the Committee does require and is entitled to the broad rights of examination of third party records. *See In re Synder*, 181 B.R. at 41. Simply put, the limitation is not applicable and the Bankruptcy Rule 2004 subpoenas are valid.

II. The *Newby* Litigation Does Not Prohibit Bankruptcy Rule 2004 Subpoenas to be Served on the Outside Directors.

The Outside Directors attempt to confuse the applicability of Bankruptcy Rule 2004 subpoenas by improperly filing their Motion in the *Newby* action and asserting that the consolidation of cases under *Newby* should somehow excuse their participation in the Committee's Bankruptcy Rule 2004 examinations arising out of the Enron bankruptcy. It is beyond question that Judge Gonzalez was fully aware of the pendency of the *Newby* action when he authorized the Committee to serve the Outside Directors. (*See* Judge Gonzalez's Order, at 3, Ex. B.) The Committee is not a party to the *Newby* litigation. As such, the mandatory stay of discovery instituted in *Newby* is inapplicable to the discovery sought by the Committee.

Nonetheless, the Outside Directors baldly assert that the discovery stay applicable in the *Newby* action should stop the Committee's investigation because "prominent members of the Creditor's Committee are prominent parties to Newby . . . . " (*See* Motion at 15.) That contention, however, entirely misconstrues the very nature of the Committee. The Committee is an independent, statutory entity established under 11 U.S.C. § 1102. *See also In re First Republicbank Corp.*, 95 B.R. 58, 59 (Bankr. N.D. Tex. 1988) (under 11 U.S.C. § 1102(a)(1) the United States trustee appoints the unsecured creditors committee to assure adequate representation of creditors). The Committee acts as a single entity on behalf of all of Enron's unsecured creditors, not in the individual interests of any one of its members. *See id.* Indeed, the Committee has served individual Committee members such as JP Morgan Chase & Co. and Westdeutsche Landesbank Girozentrale with Bankruptcy Rule 2004 subpoenas.

Simply put, the Committee is not a party to the *Newby* action, and is not bound by the discovery stay therein. Nor should the fact that discovery is stayed in *Newby* affect the Committee's ability to continue its investigation. *See In re International Fibercom*, 283 B.R. at

292-93 (pending litigation stayed in another proceeding is not sufficient to preclude discovery pursuant to Bankruptcy Rule 2004).

Once again, none of the cases relied upon by the Outside Directors supports quashing the subpoenas in light of the *Newby* action. For example, in *In re Southeast Banking*, cited by the Outside Directors, the bankruptcy trustee brought an adversary proceeding against the debtor's officers and directors and the court issued a stay of discovery in that proceeding. 212 B.R. at 400. In an effort to circumvent the stay, the trustee then served Bankruptcy Rule 2004 subpoenas on the defendants. *See id.* Unlike the facts at issue in *Southeast Banking*, the Committee did not file the *Newby* action and is not party to that lawsuit. Thus, *Southeast Banking* does nothing to advance the Outside Directors' cause.

The Outside Directors also attempt to rely on Judge Gonzalez's recent opinion denying the *Newby* lead plaintiffs access to the discovery already obtained by the Committee. (*See* Motion at 15.) That decision, however, is inapposite. As Judge Gonzalez noted (and unlike the Committee here), the Regents, the lead plaintiffs in the *Newby* action, were simply seeking to circumvent the discovery stay in the *Newby* action. *See In re Enron*, 281 B.R. at 836.

III. Blanket Assertions of Privilege and Work Product Are Insufficient Grounds for a Motion to Quash.

Finally, the Outside Directors' argue that the subpoenas should be quashed on the bases of the narrow attorney-client privilege and attorney-work product doctrine. (*See* Motion at 18.) To succeed on a motion to quash on the basis of privilege or work product, the "party cannot simply make a blanket claim of privilege; rather, the party must claim and establish the attorney-client privilege on a document-by-document basis." *See Williams v. City of Dallas*, 178 F.R.D. 103, 105 (N.D. Tex. 1998) (citing *Hugly v. Art Institute of Chicago*, 981 F. Supp. 1123, 1128 (N.D. Ill. 1997)). It is the Outside Directors' burden to establish "entitlement to protection

from discovery and the applicability of the work-product privilege" and other privileges. *Federal Deposit Insurance Corp. v. Hays*, No. CIVASA92CA653EP, 1998 WL 1782547, * 1 (W.D. Tex. Jan. 9, 1998). Here, the Outside Directors simply fill their Motion with blanket assertions of the narrow attorney-client privilege and work-product doctrine (more appropriately reserved for the privilege log called for in the subpoenas), which are insufficient to warrant granting a motion to quash. *See Williams v. City of Dallas*, 178 F.R.D. at 105 (on a motion to quash, movant must propound more than blanket assertion of privilege and work product). To the extent that the Outside Directors have valid claims of privilege, the subpoenas explicitly call for the production of privilege logs. Any objections to production on the basis of privilege, therefore, should be resolved through that well established procedure, and not through a motion to quash.[4]

CONCLUSION

For the above mentioned reasons, the Committee respectfully requests that this Court deny the Outside Directors' Motion for Protection from Bankruptcy Rule 2004 Subpoenas.

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[4] The Outside Directors also dedicate an entire section of their Motion to a discussion of the propriety of service of the subpoenas. (*See* Motion at 15-17.) To the extent that this contention has merit, the Committee will reissue the subpoenas and thereby remedy any procedural defect that has been unduly magnified in the Motion.

Respectfully Submitted,

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ATTORNEYS FOR THE OFFICIAL
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument is being served upon all counsel in this case by first class United States mail on November 5, 2002.

Charles W. Cunningham

The Exhibit(s) May

Be Viewed in the

Office of the Clerk