

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

NOV 07 2002

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Michael N. Milby, Clerk

MARK NEWBY, et al.,

Plaintiffs,

v.

ENRON CORPORATION, et al.,

Defendants.

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CIVIL ACTION NO: H-01-3624
AND CONSOLIDATED CASES

**CERTAIN DEFENDANTS' OPPOSITION TO
MEDIA'S MOTION TO INTERVENE**

TO THE HONORABLE COURT:

Defendants Kenneth L. Lay, James V. Derrick, Richard B. Buy, Richard A. Causey, Mark A. Frevert, Kevin P. Hannon, Joseph M. Hirko, Stanley C. Horton, Steven J. Kean, Mark E. Koenig, Jeffrey McMahon, Cindy K. Olson, Kenneth D. Rice, Lawrence Greg Whalley, Jeffrey K. Skilling, and Joseph W. Sutton file and serve the following Opposition to the Motion to Intervene filed by 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 (the "Media"),¹ and the Supplemental Motion to Intervene filed by ABC, Inc., and respectfully show the Court as follows:

¹ Subsequent to the filing of their Motion, the Media filed a "Brief in Support of Their Motion To Intervene and On Protective Order and Access Issues" (the "Brief"). Unless and until the Media are granted permission to intervene, their briefing on the substantive issues (which accounts for the entire Brief except for the one-page section entitled "The Basis for Intervention") should not even be considered by the Court. Therefore, the undersigned Defendants have only addressed those portions of the Media's brief that affect the Motion to Intervene. In the event the Court does allow the Media to intervene on these issues or considers their substantive briefing at all, the Defendants respectfully refer the Court to Certain Defendants' Response to Plaintiffs' Motion, which addresses the majority of the Media's arguments. To the extent the Media emphasize slightly different points, however, the Defendants respectfully request that they be allowed to respond to those points separately.

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I. INTRODUCTION

The Media seek to intervene in this proceeding for the "limited" purpose of being heard in connection with Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order, Defendants' responses, and the drafting of any protective orders in this case. As this Court well knows, however, it is difficult and complicated enough to attempt to coordinate with and accommodate the various points of view of the actual parties to this litigation. Allowing the Media to intervene in this proceeding and to interfere with the parties' efforts to develop orderly systems for reviewing and producing documents would only complicate matters further, with no corresponding benefit to the process. As discussed below, the professed goal of the Media -- unfettered access to all discovery documents -- is the same goal being pursued by Plaintiffs, and thus intervention by the Media simply is unnecessary and inappropriate.²

II. STANDARDS FOR INTERVENTION

Intervention as a matter of right is governed by Rule 24(a), which provides that "[u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject matter of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately protected by existing parties." FED. R. CIV. P. 24(a)(2). Thus, in order to intervene, the Media must meet a four prong test:

1. The application for intervention must be timely;

² To the extent the Court is interested in considering the Media's views on these issues, it could grant them leave to file an *amicus* brief without allowing formal intervention.

2. The applicant must have an interest relating to the property or transaction which is the subject of the action;
3. The applicant must be so situated that the disposition of the action may, as a practical matter, impair his ability to protect that interest; and
4. The applicant's interest must be inadequately represented by the existing parties to the suit.

League of United Latin American Citizens v. Clements, 884 F.2d 185, 187 (5th Cir. 1989).³ The Media simply fail to satisfy this test and, therefore, intervention is inappropriate.

III. THERE IS NO VALID BASIS FOR THE MEDIA TO INTERVENE IN THIS PROCEEDING.

A. The Media Has No Legitimate Interest in Discovery Documents.

In order to be entitled to intervention under Rule 24(a), the would-be intervenor must have an interest relating to the property or transaction that is the subject of the action. *Id.* To prove the requisite interest, a potential intervenor must demonstrate a "direct, substantial and legally protectable" interest in the property or transaction that is the subject of the suit. *Id.* This requires that the interest asserted be one that the substantive law recognizes as belonging to or being owned by the applicant. *Edwards v. City of Houston*, 78 F.3d 983, 1004 (5th Cir. 1996).

³ In their Brief, the Media claim in the alternative that they should be permitted to intervene under Rule 24(b), because their claim and the claim of the parties involve a common question of law. (Brief, p. 8.) This alternative ground was not advanced by the Media in their Motion, however, and was not discussed in any detail in the Brief, and it is not, therefore, properly before the Court. In any event, when acting on a request for permissive intervention -- as with intervention of right -- a district court should consider, among other factors, whether the intervenors are adequately represented by other parties and whether they are likely to contribute significantly to the development of the underlying factual issues. *Clements*, 884 F.2d at 189. Because the Media's interests are adequately represented by Plaintiffs (as discussed below), permissive intervention is inappropriate.

The Media simply have no legally protectable interest in the discovery documents at issue here. "[T]he purpose of discovery is to resolve legal disputes between the parties, not to provide newsworthy material." *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1316 (11th Cir. 2001) (Black, J., concurring). As set out more fully in Certain Defendants' Response in Opposition to Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order, already on file with this Court, the public's and the media's "right of access does not extend to information gathered through discovery that is not a part of the public record." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). Indeed, the Supreme Court has held that discovery documents are not public components of a civil trial and are, therefore, not subject to a public right of access. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984).⁴

The Media rely on *Ford v. City of Huntsville*, 242 F.3d 235, 240 (5th Cir. 2001), but the court in that case found that the media had a legal interest in the confidentiality order at issue because Texas law specifically provides that a settlement agreement to which a governmental body is a party is "public information." *Ford*, 242 F.3d at 240. Here, by contrast, the information to which the Media seek access is not public information and the Media, therefore, have no legally protectable interest in it.⁵

⁴ The Media's concession that some courts have "suggested" that pretrial discovery is not subject to the same presumption of access that arises with other judicial records (Brief, pp. 14-15) is an understatement. The Supreme Court has held unequivocally that pretrial discovery is not a "public component of a civil trial" and that a "litigant has no First Amendment right of access to information made available only for purposes of trying his suit." *Seattle Times*, 467 U.S. at 32-33. The Media's statement on page 16 of their brief that "whether pretrial discovery is considered a 'judicial record' is still an open issue in the Fifth Circuit" is disingenuous in light of the Supreme Court's clear ruling on this issue.

⁵ The Media point out in their Brief (p. 17) that under Texas state procedural rules, certain types of discovery materials are considered "court records," which may be open to the public, citing TEX. R. CIV. P. 76a. The Media concede that state procedural rules are not binding on this Court. But even if this Court were to take into consideration inapplicable Texas state procedural rules on this issue, the fact that the types of discovery documents at
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B. The Media's Alleged Interests Will Not Be Impaired By the Proposed Orders.

The next requirement for intervention under Rule 24(a) is that the applicant must be so situated that the disposition of the action may, as a practical matter, impair his ability to protect his interests. *Clements*, 884 F.2d at 187. In this case, because the Media have no legal interest in the documents at issue, the proposed protective orders will not in any way impair the Media's ability to protect their interests. *Compare, Ford*, 242 F.3d at 241 (noting "the confidentiality order which appellant wants to challenge conflicts with appellant's *right to access* information under the statute") (emphasis added).

The Media argue that in evaluating whether their interests will be impaired, the Court should "consider the unique nature of this case," and they suggest that the Court should grant them the right to intervene simply because the "public at large has a substantial stake in monitoring the details of this monumental corporate collapse." Media Motion, p. 6. But the Fifth Circuit has made clear that the protections of the First Amendment do not "depend on the notoriety of an issue" and, thus, whether or not the press should be allowed access to information is not "predicated upon the importance or degree of interest in the matter reported." *Garrett v. Estelle*, 556 F.2d 1274, 1279 (5th Cir. 1977). In fact, the propensity of the press to print every available detail about the Defendants in this case only highlights the need to protect their sensitive and confidential information.

⁵ (...continued)
issue here are *not* the type of documents considered to be "court records" under those state rules militates against public access.

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C. Whatever Interest the Purported Media Intervenors Have Is Adequately Protected by Plaintiffs.

Finally, to justify intervention as a matter of right, the applicant's interest must be inadequately represented by the existing parties to the suit. *Clements*, 884 F.2d at 187. The Media attempt to dodge this requirement by arguing that their burden to prove inadequate representation is "minimal." Motion to Intervene, p. 7. The law in the Fifth Circuit is clear, however, that the burden "cannot be treated as so minimal as to write the requirement completely out of the rule." *Edwards*, 78 F.3d at 1005.

The Media cannot demonstrate that their interests, if any, will not be adequately represented by Plaintiffs. The Media contend that their interests are "not identical" to the Plaintiffs, because the Media seek to protect their access to the discovery documents in this case and to "ensure that the public is informed of the important events of this lawsuit." Media's Motion, p. 7. Those are exactly the same goals the Plaintiffs claim to pursue. *See*, Plaintiffs' Motion, p. 19 (claiming to ensure the "continued and uninterrupted free exchange of information and documents that provide the 'transparency' by which class members and the public may monitor this action"). In contrast to *Ford*, where the parties agreed among themselves to keep the information confidential (*Ford*, 242 F.3d at 241), the Plaintiffs and Media in this case have the same ultimate objective -- unfettered access to and dissemination of discovery documents.

"When a proposed intervenor possesses the same ultimate objectives as an existing litigant, the intervenor's interests are *presumed to be adequately represented* absent a showing of adversity of interest, collusion, or nonfeasance." *United States v. Franklin Parish School*, 47 F.3d 755, 757 (5th Cir. 1995) (emphasis added); *see also*, *Edwards*, 78 F.3d at 1005; *Clements*, 884 F.2d at 189.

The proposed intervenor must "produce something more than speculation as to the purported inadequacy." *Clements*, 884 F.2d at 189. Here, the Media cannot articulate any "adversity of interest, collusion, or nonfeasance" that would rebut the presumption of adequate representation.⁶

The only argument the Media advances to rebut the presumption of adequacy is that the Media's rights of access to the documents at issue are "potentially broader than those represented by Plaintiffs." But the Media do not provide any authority for the proposition that their right of access to discovery documents is any greater than that of Plaintiffs. To the contrary, the law is clear that "all persons seeking to inspect and copy judicial records stand on an equal footing" and, thus, "the press has no greater right of access than does the general public." *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 167 (3d Cir. 1993); *see also, Garrett*, 556 F.2d at 1279. A reporter's constitutional rights are no greater than those of any other member of the public. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978). And they certainly can be no greater than the rights of the actual litigants given that the existence of the litigation is the very reason that the discovery is occurring.

Because the Media's interests are adequately represented by Plaintiffs, there simply is no reason to allow their intervention in this already complicated proceeding.

⁶ In fact, the numerous conclusory assertions and pejorative language in the Media's brief illustrate how aligned the Media's views and the Plaintiffs' views in this case really are. If the Media's briefing accurately reflects their point of view, it appears they already have pre-judged the merits of this dispute before any evidence has been presented. As discussed in Certain Defendants' Response to Plaintiffs' Motion, restricted access to litigation documents often is necessary in cases like this to minimize the danger of an unfair trial due to adverse publicity.

IV. CONCLUSION

Accordingly, because the Media have no rights to the discovery documents at issue in this litigation and because any interest they may claim to have is being adequately protected by Plaintiffs, the Media have no right to intervene in this proceeding.

WHEREFORE, Defendants Kenneth L. Lay, James V. Derrick, Richard B. Buy, Richard A. Causey, Mark A. Frevert, Kevin P. Hannon, Joseph M. Hirko, Stanley C. Horton, Steven J. Kean, Mark E. Koenig, Jeffrey McMahon, Cindy K. Olson, Kenneth D. Rice, Lawrence Greg Whalley, Jeffrey K. Skilling, and Joseph W. Sutton respectfully request that the 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 and the Supplemental Motion to Intervene of ABC, Inc. be denied. In the event that the Court grants the Media's Motion to Intervene, however, the undersigned Defendants respectfully request that they be provided an opportunity to respond to any substantive arguments made by the Media, to the extent those arguments have not already been addressed in response to Plaintiffs' Motion. Defendants also ask that they be granted such other and further relief to which they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Court's Orders of June 6, 2002 and August 7, 2002, the foregoing document was served electronically to counsel of record on November 7, 2002.

Kelli Hinson