

position of disclosure not represented by the parties. In this case, however, there is no such agreement among the parties. To the contrary, lead plaintiff has moved for an order requiring defendants “to produce documents and litigate these proceedings without the imposition of a protective order.”¹ The defendants have responded to lead plaintiff’s motion by proposing that the Court adopt a form of protective order recognized as virtually standard in commercial litigation in this country. Enron separately responded to lead plaintiff’s motion by proposing a protective order designed to meet its peculiar needs as the party who will produce many millions of pages of documents and whose resources must be selectively marshaled among many competing demands. Thus, in this case, the media’s proposed intervention offers nothing more than an echo of lead plaintiff’s position and, for this reason, should be denied.

After the media filed its motion for leave to intervene, it submitted to the Court a proposed brief in support of its motion “and on protective order and access issues,” which addresses the merits of the media’s position. Even though leave to submit this brief has not been granted, Enron will file a response to it within the time period allowed under the Local Rules.

Intervention as of Right

The media intervenors correctly set forth the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a). The media intervenors fail to satisfy the fourth requirement, that the proposed intervenor’s interest not be adequately represented by existing parties. The media intervenors admit, as they must, that the plaintiffs oppose the entry of any protective order with regard to Enron’s documents. In fact, in their brief on the merits, the media intervenors ask for

¹ Plaintiffs’ Memorandum of Law in Support of Motion to Preclude the Filing or Production of Documents Subject to a Protective Order, at 19.

precisely the same relief (“that no protective order should be entered regarding any of the Enron documents”) that the plaintiffs seek in their motion for “no protective order.” The media intervenors do not make, and cannot make, any showing that their interest is inadequately represented by the plaintiffs in this case.

In both their motion to intervene and brief in support thereof, the media intervenors do not cite to any cases analyzing this requirement in the context of the media’s right to intervene to challenge (or, in this case, prevent the entering of) a protective order. In fact, in both the motion to intervene and the brief on the merits, the media intervenors cite only to one case on the issue, *Doe v. Glickman*, 256 F.3d 371, 380 (5th Cir. 2001), for the proposition that their burden in meeting the “inadequately represented” requirement is “minimal.” The media intervenors, however, offer no persuasive distinction between their interests and the plaintiffs, clearly failing to meet even a “minimal” burden.

The Fifth Circuit has made clear that minimal does not mean non-existent:

Although the applicant’s burden is minimal, it cannot be treated as so minimal as to write the requirement completely out of the rule. When . . . the parties seeking to intervene have the same ultimate objective as the parties to the suit, the existing parties are presumed to represent adequately the parties seeking to intervene unless those parties demonstrate inadequacy of interest, collusion, or nonfeasance.

Cook v. Powell Buick, Inc., 155 F.3d 758, 762 (5th Cir. 1998). *See also Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984) (common objectives between existing party and proposed intervenor sufficient to support finding of adequate representation).

In *Glickman*, the proposed intervenor met that burden by showing that the party alleged to represent its interests had actually taken a position in concurrent litigation contrary to those interests.

Here, however, the media intervenors do not even attempt to make such a showing.

The media intervenors concede in their brief on the merits that they are working hand-in-hand with the plaintiffs. “The plaintiffs have indicated a desire to tell the Media Intervenors about what the Court-ordered Enron production will show.” Media Intervenor’s Br. at 12. Moreover, the plaintiffs in their motion assert that there should be no protective order because, in part, the lawsuits should be open to the “full review and scrutiny of the media...” Plaintiffs’ Motion at 8.

Obviously the media intervenors and the plaintiffs are coordinating their efforts to pursue exactly the same goal: defeating any protection for the Enron documents regardless of their confidentiality. The media intervenors have made no argument that the plaintiffs, represented by able counsel, cannot make the same legal arguments that they would in trying to convince the Court to allow all of Enron’s documents to be published. In fact, a comparison of the plaintiffs’ and media intervenors’ briefing shows basic duplication of the same arguments.

In the cases cited by the media intervenors, where intervention was allowed, either the parties had jointly agreed to the protective order at issue or none of the existing parties challenged the protective order. *See, e.g., Ford v. City of Huntsville*, 242 F.3d 235 (5th Cir. Jan. 22, 2001) (parties jointly submitted an agreed order of confidentiality which was entered by the court and challenged only by the proposed intervenor); *Davis v. East Baton Rouge Parish Sch. Board*, 78 F.3d 920 (5th Cir. 1996) (plaintiffs did not challenge the protective order); *Securities and Exchange Commission v. TheStreet.com*, 273 F.3d 222 (2d Cir. 2001) (stipulated protective order).²

² The one party that did not stipulate to the protective order, the SEC, argued against publication of the documents at issue and for application of the protective order along with all the parties other than the intervenor. *Id.* at 227.

Enron's counsel has not been able to find one case where a court found that the media's interest would not be adequately represented where an existing party took the same position (that there should be no protective order). This is not surprising: where the plaintiff's interest is full disclosure of all documents, there is no need for the media to come in and repeat the plaintiff's song.

As the media intervenors have wholly failed to demonstrate any reason why their interests are not adequately protected by plaintiffs, permission as of right must be denied.

Permissive Intervention

In their motion the media intervenors do not raise the issue of permissive intervention, but they mention it in one sentence in the brief on the merits, asking this Court to grant permissive intervention as an alternative. They claim to meet one of two alternative bases for permissive intervention, that they have a claim that has a question of law in common with a claim of the parties. *See Media Br. at 8; Fed. R. Civ. P. 24(b)*. They offer no arguments or citation to authority in support of their claim.

The media intervenors clearly do not meet this standard. The Newby plaintiffs allege violations of security laws. The media intervenors simply want access to documents to publish as they see fit. The media intervenors have no substantive claims. Permissive intervention is simply inapplicable here.

Moreover, even where courts have considered granting permissive intervention to the media in order to challenge a protective order, they still have not done so where, as discussed above, the media's alleged interest is adequately represented by an existing party. Under Fifth Circuit precedent, courts have the discretion to deny permissive intervention where the interests of the applicant are represented by existing parties. *See Kneeland v. National Collegiate Athletic Ass'n,*

806 F.2d 1285, 1289 (5th Cir. 1987). This Court should deny intervention on any basis as the plaintiffs are fully willing and capable of presenting the identical arguments of the media intervenors.

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CERTIFICATE OF SERVICE

I, Jonathan R. Ross, hereby certify that on the 7th day of November, 2002, the foregoing was served by e-mail or facsimile on the attached service list.


Jonathan R. Ross

The Service List

May be Viewed in

the Office of the Clerk