UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES LITIGATION	
This Document Relates To: MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	Consolidated Civil Action Case No.: H-01-CV-3624
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. KENNETH L. LAY, et al., Defendants.	

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED

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BANK DEFENDANTS' MEMORANDUM OF LAW IN RESPONSE TO THE MEDIA ENTITIES' MOTION TO INTERVENE AND THEIR BRIEF IN SUPPORT OF MOTION TO INTERVENE AND ON PROTECTIVE ORDER AND ACCESS ISSUES

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BANK DEFENDANTS' MEMORANDUM OF LAW IN RESPONSE TO MEDIA ENTITIES' MOTION TO INTERVENE AND THEIR BRIEF IN SUPPORT OF MOTION TO INTERVENE AND ON PROTECTIVE ORDER AND ACCESS ISSUES

Defendants Bank of America Corporation, Credit Suisse First Boston Corp., Citigroup, Inc., Deutsche Bank AG, Barclays PLC, Merrill Lynch & Co., Inc., J.P. Morgan Chase & Company, Canadian Imperial Bank of Commerce, and Lehman Brothers Holdings Inc. (collectively, the "Bank Defendants") respectfully submit this memorandum in response to the Motion to Intervene (the "Motion") by Dow Jones & Co., Inc., The New York Times Co., the

Washington Post, *USA Today*, the *Houston Chronicle*, the Reporters' Committee for Freedom of the Press, and ABC, Inc. (the "Media Entities"), pursuant to Rule 24(a) and 24(b) of the Federal Rules of Civil Procedure, and the Media Entities' related brief.[1]

Preliminary Statement

The Media Entities have moved to intervene for the "limited purpose" of being heard on Plaintiffs' motion to preclude the entry of a protective order and the various proposals for protective orders in this case. Motion at 1-2; Media Entities' Br. at 1-2. The Bank Defendants do not object to the Media Entities being heard on this limited issue. Indeed, the Media Entities have already set forth their views for the Court in their motion papers. They do not, therefore, need to be parties to this action in order to be heard on the proper scope of any protective order to be entered here, or otherwise present their arguments to the Court. Moreover, if an intervenor's interest is adequately represented by an existing party, intervention under Rule 24(a) and 24(b) is unnecessary and inappropriate unless there is a clear showing of adversity of interest, collusion among the existing parties or nonfeasance by the party sharing the interest with the proposed intervenor. The Media Entities have made no such showing here.

The Media Entities' substantive arguments on the protective order issue fail insofar as they relate to the Bank Defendants. The Media Entities mistakenly assume, as do Plaintiffs, that the notoriety of this case is a good and sufficient reason to preclude the Bank Defendants from exercising their rights under Rule 26(c) to protect confidential information. Rule 26, however, is not limited to routine or uncontroversial cases; any party showing "good cause" may obtain an order protecting its confidential information from disclosure. Fed. R. Civ.

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1 The Media Entities served the Motion on October 18, 2002 and then on October 25, 2002 served a brief in support of the Motion and relating to protective order and access issues. This response addresses both the Motion and the Media Entities' brief.

P. 26(c)(7). And, the "factors" the Media Entities urge this Court to take into account in deciding whether a producing party has the right to protect its confidential information are either erroneous or inapplicable. The Media Entities claim a presumption of public access to the discovery materials in this case, but the case law — including cases cited by the Media Entities — holds that no presumption exists with regard to *unfiled* discovery materials. The Media Entities claim that the Court must take into account state laws regarding access to public records. But the cases they cite do not apply here because those decisions involved state or local entities governed by state disclosure laws which do not impair the rights of private litigants under Rule 26. Finally, the Media Entities claim that all confidentiality interests have been lost as a result of document productions to various government entities and regulators. But where a producing party has taken steps to assure the confidentiality of the documents — as has been done here — there is no waiver. In sum, there is good cause under Rule 26(c) for the entry of a standard protective order here.

Argument

I. Intervention Is Unnecessary Here

The Bank Defendants have no objection to the Court hearing and considering the Media Entities' views and granting them *amicus curiae* status. Accordingly, intervention is unnecessary for the Court to permit the Media Entities to be heard on the limited protective order issue. *See Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984) (holding under similar circumstances that the "position of *amicus* . . . is more appropriate than an intervention with full-party status"); *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 473 (5th Cir. 1984) (en banc) (same); *United States v. Tex. Educ. Agency (Lubbock Indep. Sch. Dist.)*, 138

F.R.D. 503, 508 (N.D. Tex. 1991) (denying motion to intervene, but granting *amicus curiae* status).

To intervene as a matter of right under Rule 24(a), a party must show that its interests are "inadequately represented by the existing parties." *Taylor Communications Group, Inc. v. Southwestern Bell Tel. Co.*, 172 F.3d 385, 387 (5th Cir. 1999). The same showing must be made for permissive intervention under Rule 24(b). *See, e.g., League of United Latin Am. Citizens v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989) ("When acting on a request for permissive intervention, a district court should consider, among other factors, whether the intervenors are adequately represented by other parties . . . ."). Where, as here, "the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion or nonfeasance." *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 168 (5th Cir. 1993) (quotations and citations omitted).

In their respective briefs, the Media Entities and Plaintiffs proclaim the same overarching interest: the unfettered disclosure of confidential information to the public. *Compare* Motion at 6 (discussing the interest of the "public at large" in gaining access to confidential information) *with* Pls.' Memo. of Law at 1 (noting that Plaintiffs are seeking relief in the interest of providing access to, among others, "the public at large"). Plaintiffs even cite First Amendment cases involving the media and argue that the media must be given access to confidential information in order to act as a conduit to the general public. *See, e.g.*, Pls.' Memo. of Law at 8-10.

The Media Entities, however, assert that their interest and Plaintiffs' interest are "not identical" because the Media Entities' interest is "potentially broader." Motion at 7; *see*

also Media Entities' Br. at 8. This, of course, is mere speculation and, in any event, the likelihood of any divergence of interest is remote since the Plaintiffs have taken the Media Entities' argument to the extreme by urging that documents produced in this litigation should be afforded *no protection whatsoever*.

The Media Entities cite two inapposite cases on the adequacy of representation issue, *Doe v. Glickman*, 256 F.3d 371 (5th Cir. 2001) and *Ford v. City of Huntsville*, 242 F.3d 235 (5th Cir. 2001). In *Ford*, the existing parties had taken a position on confidentiality that was adverse to the moving party, 242 F.3d at 241, which is *not* the case here. And, in *Glickman*, the court noted that one of the existing parties to the action had failed to take certain steps to protect the proposed intervenor's interest and that it was likely the interest of the proposed intervenor and existing party would diverge in the future. 256 F.3d at 380-81. Again, that is *not* the case here. Rather, the Media Entities and Plaintiffs have the same purported interest in the disclosure of confidential information and Plaintiffs have vigorously asserted it on their behalf.

II. The Media Entities' Arguments On Protective Order Issues Fail

A. The Media Entities Are Asking The Court To Disregard The Bank Defendants' Rights Under Rule 26

The Media Entities' arguments, like Plaintiffs', are premised on the faulty assumption that the sensational nature of this case somehow trumps the Bank Defendants' rights under Rule 26 of the Federal Rules. *See* Media Entities' Br. at 21-25 (citing media interest in the Enron affair). If that were the standard, no protective order would ever be entered in high-profile lawsuits. As is clear from the plain language of Rule 26(c), confidential information can be protected from disclosure so long as "good cause" is shown. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-45 (1984) (observing that Rule 26(c) is designed to protect litigants from the harm that could result from the disclosure of discovery materials). And, as the Bank Defendants

showed in their opposition to Plaintiffs' motion, there is good cause here for the entry of a standard protective order.

B. Several Of The "Other Factors" Cited By The Media Entities Should Play No Role In The Court's Consideration Of Protective Order Issues

The Media Entities cite a list of "factors" that they say "should inform the Court's exercise of its discretion" under Rule 26. Media Entities' Br. at 10. But these factors are either irrelevant or have been misstated.

First, there is no established presumption of access to unfiled discovery material. Media Entities' Br. at 15-16. As the Media Entities concede, *id.* at 14-15, the United States Supreme Court has stated that unfiled discovery materials are generally not open to the public and must be treated differently. *See Seattle Times*, 467 U.S. at 33 (holding that "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information"). Consistent with *Seattle Times*, courts in this Circuit have similarly drawn a distinction between filed and unfiled materials. *See United States v. Gurney*, 558 F.2d 1202, 1209 (5th Cir. 1977) (holding that there is no First Amendment right to documents that are not part of the public record); *Word of Faith World Outreach Ctr. Church, Inc. v. Morales*, 143 F.R.D. 109, 113 (W.D. Tex. 1992) (citing *Seattle Times* and granting protective order limiting disclosure of deposition).

The Media Entities cite *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999) for the proposition that "most cases" endorse a presumption of public access to discovery materials. Media Entities' Br. at 15. *Citizens First*, however, involved discovery material that had been filed with the court. *See In re Bridgestone/Firestone, Inc.*, 198 F.R.D. 654, 657 (S.D. Ind. 2001) ("Access to discovery materials when those materials have been presented to the court is one issue and quite another

issue when the parties are exchanging the materials among themselves."). Indeed, several of the cases cited by *Citizens First* expressly recognize that there is no presumption of access to unfiled discovery materials. *See Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994) ("the media's right of access does not extend to information gathered through discovery that is not part of the public record"); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 788 (1st Cir. 1988) (stating that any claim of "a general common law or first amendment right to inspect . . . discovery materials" has been "largely foreclosed" by the *Seattle Times* case).[2] Other courts have similarly found that there is no presumption of access where, as here, the discovery materials have not been filed with the court. *See* Bank Defendants' Memo. of Law at 12-13 (listing cases); *see also United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995) ("Documents that play no role in the performance of Article III functions, such as those passed between the parties in discovery, lie entirely beyond the presumption's reach."); *Doe v. Blue Cross Blue Shield of Md.*, 103 F. Supp. 2d 856, 857 (D. Md. 2000) (the common law of right of access does not attach to the unfiled "raw fruits of discovery" and the consensus among Courts of Appeal "is that the documents must in some way have been filed with the court" to qualify as a "judicial document").

Second, the Texas Rules Civil Procedure to which the Media Entities refer are inapplicable. Media Entities' Br. at 16. Texas procedural rules do not apply in federal court. *See Hanna v. Plumer*, 380 U.S. 460, 470-471 (1965); Tex. R. Civ. P. 2 ("[t]hese rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature"). The Media Entities offer no support for the notion that the application of Rule 26(c) varies depending on the procedural law of the state in which a particular federal court

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2 The *Public Citizen* court noted that any claim of public access must instead be assessed under the "good cause" standard in Rule 26. *Id.* at 789-90.

sits, a result that would undermine "[o]ne of the shaping purposes of the Federal Rules . . . to bring about uniformity in the federal courts." *Hanna*, 380 U.S. at 472 (quotation omitted).[3]

The Media Entities' reliance on *Ford v. City of Huntsville*, 242 F.3d 235 (5th Cir. 2001) and *Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920 (5th Cir. 1996) is entirely misplaced. In *Ford*, the Fifth Circuit considered a confidentiality order that prohibited a state governmental entity (the defendant city) from disclosing the terms of its settlement with the plaintiff. *See* 242 F.3d at 241. That order created a direct conflict with state law, which required the city to disclose the terms of the settlement to the public. *See id.* Noting that the federal courts may exercise their discretion to issue confidentiality orders even in the face of a conflicting state statute, *see id.*, the court held that "where a governmental entity is a party," the court should consider the effect of any such order "on disclosure of governmental records to the public under state and federal freedom of information laws." *Id.* at 242 (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791 (3rd Cir. 1994)). Similarly, *Davis* concerned a confidentiality order that directed a local school board in Louisiana to formulate and negotiate a desegregation plan in private sessions. 78 F.3d at 929. The order created a potential conflict with Louisiana's Open Meetings Law, La. Rev. Stat. Ann. § 42:4.1-11 (1990), which required state public bodies to conduct certain of their activities in public. The Fifth Circuit held that the

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3 In any event, this case does not present a "unique" situation such that certain discovery materials may be treated as "court records" within the meaning of Tex. R. Civ. P. 76a. *See* Media Entities' Br. at 17. Tex. R. Civ. P. 76a(2)(c) provides that discovery may constitute a court record only if it is "concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government." Although the Enron matter is of public interest, none of the allegations in this case (and none of the relevant discovery) concerns public health or safety or government conduct. Also, even if discovery materials are deemed "court records" in a Texas state court proceeding, a protective order may still be appropriate under Tex. R. Civ. P. 76a if those materials reflect trade secrets. *See Eli Lilly and Co. v. Marshall*, 829 S.W.2d 157 (Tex. 1992).

district court abused its discretion in "enter[ing] a sweeping order requiring a public entity to conduct confidential meetings . . . without considering whether the meetings that it ordered complied with the Louisiana Open Meetings Law." *Id.* at 931.

The entry of a protective order in this case would be fully consistent with state law. None of the Bank Defendants is a governmental entity subject to freedom of information laws and there is no state law requiring the Bank Defendants to disclose their confidential business information to the public.

Third, the production of documents to governmental entities under compulsion does not result in a waiver of confidentiality. *See* Media Entities' Br. at 17-19. The documents produced by the Bank Defendants to government entities and regulators were produced with the express understanding that they would remain confidential. Bank Defendants' Memo. of Law at 7. The Media Entities cited no authority for the proposition that the production of documents in response to government subpoena or compulsion results in a waiver of confidentiality. They cite *Ford*, 242 F.3d at 242, to argue that there is "strong presumption" against granting a confidentiality order regarding documents produced to the government if the order would prevent the disclosure of information under freedom of information laws. *See* Media Entities' Br. at 18-19. But, the *Ford* court held that such a presumption applies only "where a governmental entity is a party to litigation." 242 F.3d at 242.

III. The Media Entities' Proposal For An "Individualized Determination" Of Confidentiality By The Court Is Unworkable

In lieu of the standard protective order the Bank Defendants propose, the Media Entities urge this Court to make "an individualized determination . . . as to the confidentiality of

documents." Media Entities' Br. at 2.[4] Courts have rejected such document-by-document confidentiality reviews as inefficient and a misuse of judicial resources:

> If courts were obliged to make determinations, item by item, as to the justification for confidentiality of every piece of evidence as to which any party or witness made such a claim during the conduct of discovery, *see* Fed. R. Civ. P. 26(c), there would be little time in which to do anything else. In consequence, parties frequently agree, with the courts' approval, that they will maintain in confidence anything produced in discovery as to which the producing party or witness makes such a claim, subject to the right of the party seeking discovery to contest the designation.

Greater Miami Baseball Club Ltd. P'ship v. Selig, 955 F. Supp. 37, 39 (S.D.N.Y. 1997). *See also In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1996 WL 84185, at *5 (N.D. Ill. Feb. 21, 1996) ("To say that such a document-by-document review would be 'unfeasible' in what has become an enormous, and perhaps unprecedented, discovery effort would be an understatement."); *Kamyr AB v. Kamyr, Inc.*, No. 91-CV-0453, 1992 WL 317529, at *6 (N.D.N.Y. Oct. 30, 1992) ("To accept the proposed intervenor's position requiring a document-by-document review would defeat *the very purpose of the Rule 26(c)(7) provision* — namely, to allow the orderly and expedient process of discovery."). Even *Citizens First*, on which the Media Entities place great reliance, noted that in a case with thousands of documents the requirement of a document-by-document review "might impose an excessive burden on the district judge or magistrate judge." *Citizens First*, 178 F.3d at 946.

Simply put, there is no reason for this Court to enter anything other than a standard protective order such as the one contemplated by the Bank Defendants.

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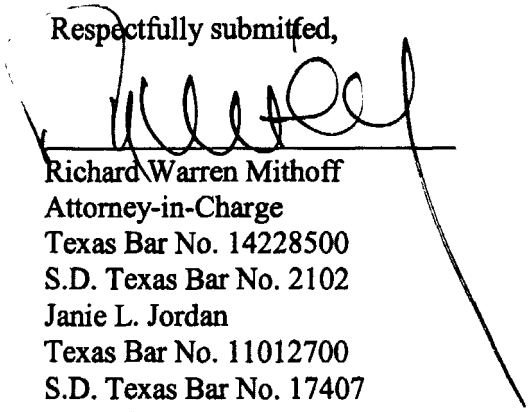
[4] The Media Entities also state that any protective order should "impose a strong presumption of non-confidentiality and public access" as well as a "high burden" of proof on the party seeking confidentiality. *Id.* As discussed above, such conditions are not required under Rule 26 or the case law and they are not warranted here.

Conclusion

For the foregoing reasons, the Bank Defendants respectfully request that the Court order that a standard protective order is warranted under Rule 26.

November 7, 2002

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served on all known counsel of record via electronic mail to the website on this 7th day of November, 2002.

RICHARD WARREN MITHOFF