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

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

In re ENRON CORPORATION 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 CORP., et al., Defendants.	§	
THE REGENTS OF THE UNIVERSITY PF CALIFORNIA, et al., Individually and on behalf of All Others Similarly Situated, Plaintiffs,	§	
vs.	§	
KENNETH L. LAY, et al. Defendants.	§	

ENRON CORP.'S RESPONSE TO MEMORANDUM BRIEF 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

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The media intervenors and plaintiffs seek unprecedented and extraordinary relief: no protective order whatsoever, regardless of the merits of a claim of confidentiality. They would have this Court believe that the events surrounding Enron are so unique that the Court should ignore the Federal Rules that allow parties, third parties, and non parties to, at a minimum, present argument to the Court as to why some of their documents need protection. Despite the rhetoric, neither the media intervenors nor the plaintiffs present a reasoned argument as to why this case should not proceed as other complex civil litigation cases have proceeded, or why the numerous governmental entities investigating Enron cannot sufficiently protect the public interest.

The media intervenors base their request for relief on their bald assertion that Enron waived its rights to request confidential treatment of documents it previously produced to governmental agencies. Not surprisingly, the media intervenors fail to cite any authority for this position. In fact, no such authority exists. Production of documents by a party to governmental agencies does not automatically waive that party's right to seek a protective order. Moreover, Enron has specifically requested confidential treatment of the documents produced to such agencies pursuant to applicable statute and regulation. Finally, despite the claims of the plaintiffs and media intervenors, the protective order proposed by Enron balances the parties' right to maintain the confidentiality of selected documents with the plaintiffs' need to publish documents relevant to the facts of their case.

I. Enron Has Not Waived Its Rights To Seek a Protective Order to Maintain the Confidentiality of Commercially Sensitive Materials

The media intervenors assert without citation to any authority whatsoever that Enron has waived confidentiality as to any of the documents produced to the government.[1] The media intervenors cite to no authority because there is none. This Court should not set the dangerous precedent of holding that the mere disclosure of documents to a governmental investigation, by itself, operates to remove forevermore a party's right to claim confidentiality of any document submitted.

Furthermore, Enron specifically requested, and has received, confidential treatment of documents it produced to numerous governmental agencies to which it made disclosures.[2] While it is true that not everything that Enron produced was confidential, and the multiple investigations put a significant strain on Enron's ability to timely comply with all requests, this fact does not act as an automatic waiver of confidentiality for all documents. This Court has broad discretion to enter a protective order that will continue to protect confidential documents that have not been disclosed to the public by the government.

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[1] The media intervenors' other legal arguments for no protective order duplicate those made by plaintiffs. Enron has already responded to these arguments and will not repeat itself here. Not only does Enron incorporate its own Opposition to Plaintiffs' Motion for No Protective Order into this brief, it also adopts and incorporates the other defendants responses to the media intervenors' brief on the merits.

[2] The agencies and congressional committees to whom Enron has produced documents have, by and large, kept the documents confidential. Where they have not, the media intervenors have already had access to and presumably obtained the documents that, for example, one congressional committee has published on its Internet site.

Similarly, while the media intervenors assert that Enron should have no difficulty in determining before production which documents are confidential (See Media Intervenors' Br. At 29), the coding that the documents are receiving is irrelevant to issues of confidentiality. The plaintiffs' discovery requests entail the production of millions of documents. A substantive review of this volume of documents to determine which of the materials are confidential would take months even if Enron could devote an army of lawyers to do the review. See Williams Affidavit at ¶ 9.

A. Mere production to the government does not waive confidentiality.

Plaintiffs cite no authority for the proposition that mere production to a governmental entity which is conducting a governmental investigation forever waives the confidentiality of those documents. It is not surprising that they do not. That proposition would severely impede the investigatory capabilities of the government as companies would not cooperate with investigations (or fight compulsory production) if by doing so they would lose the right to claim that any of their competitively sensitive documents were confidential.

We know that this proposition is not the law because of the statutory and regulatory provisions providing for confidential treatment of such documents. Many of the committees and agencies to which Enron produced documents have these provisions in place:

- The CFTC: 17 C.F.R. §§ 11.3, 145.5(d), and 145.9 (Providing for confidentiality of trade secrets and commercial and financial records and exempting that production from disclosure under the Freedom of Information Act (FOIA) pursuant to exemption 4, 5 U.S.C. § 552(b)(4));
- The FERC:18 C.F.R. §§ 1b.20, 388.107(d) & 388.112 (Providing for confidentiality of trade secrets and commercial and financial information and exempting that

production from disclosure under FOIA pursuant to exemption 4, 5 U.S.C. § 552(b)(4));

- United States Attorneys/DOJ Grand Jury Proceedings: Federal Rule of Crim. P. 6(e) (general secrecy of grand jury proceedings, with subpart (6) calling for sealing of all records relating to grand jury proceedings);

- The PBGC: 5 U.S.C. §522a *et seq.* (allows for the maintaining of confidentiality of documents to protect privacy interests);

- The SEC: 17 CFR 200.83 (providing confidentiality and exemption from disclosure under FOIA, 5 U.S.C. § 552(b)(4)).

- The DOL: 29 CFR 70.26 (allowing for maintaining confidentiality of commercial information)

In fact, the FOIA exception is applicable to all the federal agencies to which Enron has submitted documents. *See* 5 U.S.C. §§ 101 through 105, and § 552(a).[3] Moreover, the case law has consistently recognized FOIA's (b)(4) exemption allowing the agencies to refuse requests for the production of commercially sensitive information. *See, e.g., National Parks & Conservation Assoc. v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976) (disclosure of a company's detailed financial information harmful and hence the exemption to disclosure applies); *Calhoun v. Lyng*, 864 F.2d 34, 36 (5th Cir. 1988) (affidavits and letters from entities producing documents to the government sufficient to show likely harm to producers from disclosure, thus the (b)(4) exemption from production applies).

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[3] This brief focuses on the confidential and trade secret exemption to production under FOIA. There are other exemptions from production, such as the investigative exemption (522(b)(7)), which allows the agencies to refuse to produce documents where the production would impede an agency's investigation. For this reason alone, Enron believes that the agencies will generally choose to keep Enron's production to them confidential.

It is clear that the government has provided for the confidentiality of documents produced to it through its investigative process. There is simply no authority to support the media intervenors' assertion that Enron's cooperation with the government has caused it to forfeit its right and non-parties' rights to keep otherwise confidential documents protected.

B. Enron has generally requested confidential treatment of the documents it has produced to the government.

Enron has not merely relied on statutory or regulatory provisions, but has specifically requested the confidential treatment of documents that it has produced to governmental agencies. Attached to this brief is an affidavit collecting letters to the CFTC, the FERC, the Department of Justice, the PBGC, the SEC, the Senate Government Affairs Committee, and the House Committee on Energy and Commerce, all requesting on behalf of Enron that documents be treated confidentially.

Enron does not claim that it requested confidential treatment in every communication that it had with government agencies and congressional committees. The governmental investigations were (and continue to be) far-flung and onerous. In producing millions of pages of documents, Enron has produced much which is not confidential, or is no longer confidential. Enron provides these examples to rebut the media intervenors' assertion that Enron did nothing to request confidential treatment of its competitively sensitive documents. The combination of the statutory provisions and Enron's requests for confidential treatment demonstrates Enron's diligent efforts to keep that which is competitively sensitive confidential.

C. This Court has the discretion to enter Enron's requested protective order.

The governmental agencies and congressional committees to which Enron has produced documents have generally granted Enron's request for confidential treatment of its documents.[4] This Court can and should continue to protect the competitively sensitive and otherwise confidential nature of Enron's documents.

Enron's proposed protective order allows the Court to protect Enron's competitively sensitive documents, much of which are completely irrelevant to any claim or defense in these cases. Those documents continue to merit and need protecting. Enron is unaware of any FOIA requests that have been made on the governmental agencies to which Enron has produced documents, so by and large their confidentiality has been maintained.[5]

D. Enron Seeks a Reasonable Process, Not Absolute Secrecy

Enron has proposed a process. A process that is the only fair and practical way to deal with the millions of documents that are about to be produced. Under Enron's proposed protective order, plaintiffs may nominate <u>any</u> document for publication. The protective order gives the producing party the opportunity to review those documents to determine if they are confidential and, if so, to present to the Court the reasons why the Court should maintain confidentiality. The burden remains on Enron to persuade the Court that a particular

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[4] Enron is aware of one congressional committee that has published some of Enron's production to it on its Internet site.

[5] The fact that the media intervenors have apparently not made any successful requests is further evidence that they recognize that such requests would be fruitless because of the FOIA exceptions noted above.

document merits protection once the plaintiffs (or any other party) make known their desire to publish the document. Enron's process is the only process that can practically deal with the millions of documents about to be poured into the document depository.

Nor will Enron seek confidentiality for any and all documents. In its opposition to Plaintiffs' Motion for No Protective Order, Enron attached the affidavit of Robert C. Williams, which outlined four categories of confidential information that Enron seeks to protect. Much if not all of what is relevant to plaintiffs' claims in this case does not fall within those categories, and Enron will not be seeking protection for those documents. Under Enron's proposed protective order, this Court's time will not be wasted with reviewing hundreds of thousands of documents for two very good reasons. First, plaintiffs will not seek to publish everything, but only those documents that they believe are relevant to and support their claims in these cases. Second, Enron will not seek to protect everything, but only those documents that it has a good-faith concern for their confidentiality, and for which Enron can present a sufficient basis in asking the Court to protect that confidentiality.

In fact, Enron believes that many of the documents that warrant protection are absolutely irrelevant to the claims and defenses in this case, as its production to the various governmental agencies and committees was far broader then the subject matter of the plaintiffs' claims in these cases. Thus Enron believes that any review necessitating the involvement of the Court or a special master will be manageable, as it will involve only a limited number of documents where the parties have a genuine disagreement.

It is beyond argument that the press has diligently reported the Enron story without the assistance from this Court that the media intervenors demand. The plaintiffs' complaints in these cases rely heavily on press reports. But these cases are, or ought to be, about claims and defenses, not a vehicle for press discovery. Because Enron will not object to the publication of documents that are not commercially sensitive or otherwise confidential as outlined in the Williams Affidavit, it is likely that the press in any event will obtain much of what they seek. But this Court should not grant the media intervenors' wish to use this case as a fishing expedition for their own devises without protection of the parties and non-parties whose confidential documents will be in the depository.

Conclusion

Both the plaintiffs and the media intervenors have gone to great effort to prevent the parties from protecting any documents from public scrutiny, regardless of the merits of a party's claim of competitively sensitive information requiring protection. Enron and the other defendants ask only the ability to protect certain documents that they can demonstrate merit protection. Enron's proposal is the only one that allows Enron to comply with the Court's production orders while reserving the ability to demonstrate good cause as to why certain documents merit protection.

Respectfully submitted,

SUSMAN GODFREY L.L.P.

By: _____

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CERTIFICATE OF SERVICE

I, Jonathan J. Ross, hereby certify that on the 20th day of November, 2002, the foregoing was served by e-mail or facsimile on the attached service list.

Jonathan J. Ross

The Service List

May be Viewed in

the Office of the Clerk

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

PAMELA M. TITTLE, ET AL.,	§	
	§	
Plaintiffs,	§	**CIVIL ACTION NO. H-01-3913**
	§	**(CONSOLIDATED)**
vs.	§	
	§	
ENRON CORP., ET AL.,	§	
	§	
Defendants.	§	

AFFIDAVIT OF JONATHAN J. ROSS

THE STATE OF TEXAS	§
	§
COUNTY OF HARRIS	§

JONATHAN J. ROSS, after first being duly sworn upon his oath, makes this affidavit and states the following:

My name is JONATHAN J. ROSS. I am over the age of twenty-one (21) years, am competent to testify to the matters stated herein, have personal knowledge of the facts and statements in this affidavit, and each of the facts and statements is true and correct.

Attached to this affidavit are the following document transmittal letters from counsel for Enron to various governmental entities:

(1) Letter dated 11/20/01 to Douglas b. Paul, Branch Chief, Securities and Exchange Commission, Division of Enforcement from Joseph K. Brenner, Wilmer, Cutler & Pickering, 2445 M. Street N.W., Washington, D.C. 20037-1420.

(2) Letter dated 04/23/02 to Brenda Bachman, Office of the General Counsel, Pension Benefit Guaranty Corporation from Vincent Paul Schmeltz, III, of Skadden, Arps, Slate, Meagher & Flom, 333 West Wacker Drive, Chicago, Illinois 60606-1285.

(3) Letter dated 07/17/02 to Stephen J Obie, Senior Trial Attorney, Division of Enforcement, U.S. Commodity Futures Trading Commission from Ronald W. Zdrojeski, LeBoeuf, Lamb, Greene & MacRae, 225 Asylum Street, 13th Floor, Hartford, Connecticut 06103.

(4) Letter dated 08/30/02 to Kim G. Bruno, Esq., Market Oversight and Enforcement, Federal Energy Regulatory Commission, from Bruce W. Neely and Samuel G. Backfield of LeBoeuf, Lamb, Greene & MacRae, 1875 Connecticut Avenue, N.S., Suite 1200, Washington, D.C. 20009-5728.

(5) Letter dated 09/11/02 to Robert L. Roach, Permanent Subcommittee on Investigations, Senate Committee on Government Affairs from Saul M. Pilchen of Skadden, Arps, Slate, Meagher & Flom, 1440 New York Avenue, N.W., Washington, D.C. 20005-2111.

(6) Letter dated 10/11/02 to Mark Paoletta, Esq, Chief Counsel for Oversight and Investigations, House Committee on Energy and Commerce from Saul M. Pilchen of Skadden, Arps, Slate, Meagher & Flom, 1440 New York Avenue, N.W., Washington, D.C. 20005-2111.

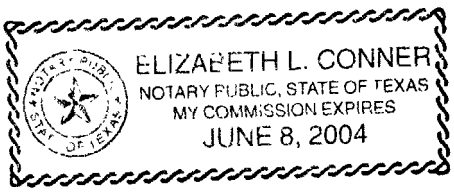
(7) Letter dated 10/29/02 to Lia Tenorio-Kutzkey, U.S. Department of Justice, Antitrust Division, Northern District of California, from Ronald W. Zdrojeski, LeBoeuf, Lamb, Greene & MacRae, 225 Asylum Street, 13th Floor, Hartford, Connecticut 06103.

FURTHER, AFFIANT SAITH NOT.

JONATHAN J. ROSS

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, by JONATHAN J. ROSS, on this 20th day of November, 2002, to certify which witness my hand and seal of office.

Elizabeth L. Conner
Notary Public in and for the State of Texas



My Commission Expires: 6/8/04

The Exhibit(s) May

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