UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
DEC 03 2002
Michael N. Milby, Clerk

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 CORPORATION., *et al.* Defendants.	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,	§	
vs.	§	
KENNETH L. LAY, *et al.* Defendants.	§	

REPLY BRIEF OF
DOW JONES & CO., INC., THE NEW YORK TIMES CO.,
THE WASHINGTON POST, USA TODAY, THE HOUSTON CHRONICLE, ABC
AND THE REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS'
IN SUPPORT OF MOTION TO INTERVENE AND ON
PROTECTIVE ORDER ISSUES

TO THE HON. MELINDA HARMON, UNITED STATES DISTRICT JUDGE:

Dow Jones & Company, Inc., the New York Times Company, the *Washington Post, USA Today*, the *Houston Chronicle*, ABC, Inc., and The Reporters' Committee for Freedom of the Press (collectively "Media Intervenors") file this Reply Brief in support

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of their motion to intervene and would respectfully show:

I. THE MEDIA INTERVENORS SHOULD BE PERMITTED TO INTERVENE.

A. The Media Intervenors and the Plaintiffs' Interests Differ Substantially.

Defendants' primary argument raised in opposition to the Media Intervenors' motion to intervene is an assertion that the Media Intervenors' interests are fully and adequately represented by the Plaintiffs' current position opposing entry of a protective order.[1] This critique is wrong, however, because it confuses a party's *interests* with its *arguments*.

None of the defendants' briefs cite a single case where intervention by the media was denied, or the grant of leave to intervene was reversed, because one of the parties to a suit was resisting the entry of a protective order. The Media Intervenors believe this is for a good reason: while the *arguments* of two parties may coincide in a proceeding, that does not mean that their *interests* are the same. In this case, although their arguments currently overlap with regards to the entry of a protective order, the Plaintiffs' interests and the Media Intervenors interests are materially and substantially different, and the Court cannot, and should not, rely on the Plaintiffs to single-mindedly pursue the general public interest of maximizing the amount of information available for news reporting.

The Plaintiffs' interests. The Plaintiffs' overriding interest is to prove the Defendants' liability and to maximize their recovery in damages. The Plaintiffs' counsel

[1] The Outside Directors have also argued that the intervention is moot because the Court, in its Depository Order, indicated that a confidentiality order will be entered in the case. But the Court has not yet determined the form of any order, nor what it will cover. The intervention, to be involved in the Court's decision about a confidentiality order, coming before the Court exercises its discretion on the form of its order, cannot be moot.

have an unflagging duty to represent their clients zealously in pursuit of this interest. *See* Tex. Disc. R. Prof. Conduct, Preamble: A Lawyer's Responsibilities ¶ 3. Currently, the judgment of Plaintiffs' counsel is apparently that their clients' interests will be advanced if the document discovery is publicly available. However, that interest is and must remain a strictly tactical one: an interest that can, and must be, compromised at any point in the proceeding if necessary to advance the Plaintiffs' ultimate interests in establishing liability and maximizing a recovery in damages.

The Plaintiffs' counsel may decide that maximum public access to information about Enron and the other Defendants is not beneficial to their clients' case, or they may decide to devote resources to other portions of their case preparation, rather than to opposing entry of a secrecy order. The Plaintiffs' counsel might legitimately use their current efforts to make documents public as leverage for gaining a different tactical advantage. They might "horse-trade" their position as to confidentiality for another tactical advantage that they see as more beneficial to advancing their claims – all in the rightful pursuit of their clients' ultimate interests.

The Media Intervenors' interests. The Media Intervenors' interests are very different. The Media Intervenors are not trying to establish or disprove liability, or to recover damages. The Media Intervenors' sole and ultimate interest is in having the fullest access to information and documents concerning one of the most spectacular and wide-ranging business failures of the 20th Century. In short, their interest is *in gathering and reporting the news to the public*. It is not the outcome of the lawsuit that is at interest for the Media Intervenors, it is the substance and the process of the litigation. It is immaterial whether the Plaintiffs win, the Defendants win, or there is a mixed result; the

media's interest remains the same: informing the public about the legal proceedings stemming from the Enron collapse and the underlying facts surrounding the Enron situation that comes to light during the proceedings. This is their sole and overriding interest, and unlike the Plaintiffs, it is not a tactical strategy in a case where the ultimate goal is far different.[2]

Because the Media Intervenors' interests different from the Plaintiffs', and because they cannot rely on the Plaintiffs to steadfastly pursue the Media Intervenors' interests regardless of the course of litigation, the Media Intervenors have standing to intervene. And while it is true that in reported cases where media entities have intervened to challenge the terms of protective orders those challenges have been made *after* an order has been entered, nothing in those cases *limits* the media's right to intervene until *after* an order has been entered. To the contrary, logic suggests that the more effective and efficient time for intervention is *before* an order is entered, so that the Court can consider the interests of newsgathering and the concomitant public interest in learning about a case with significant widespread impact.

B. The Media Intervenors Have A Sufficient Legal Ground For Intervention.

The Outside Directors suggest that because the Supreme Court in *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), declined to find a specific, independent First Amendment right of access to litigation discovery materials, that the Media Intervenors have no interest at all in what protective order is entered, and no legal basis for seeking to

[2] Intervenors do not assert that by being allowed to intervene Intervenors become parties to the lawsuit and, therefore, entitled to access to the discovery in the case. Intervenors are intervening for the limited purpose of addressing whether the Court enters a confidentiality order or, if it does, the confidentiality issues to be considered by the Court in issuing any protective order.

intervene. This argument fails to reconcile, however, the numerous cases decided *after* the ruling in *Seattle Times* that permitted media entities leave to intervene when restrictive protective orders were entered. *See, e.g., Securities & Exchange Commission v. The Street.com*, 273 F.2d 222 (2d Cir. 2001).

The reason behind this is simple: even if *Seattle Times* failed to define a separate First Amendment right to access to the products of discovery, it did *not* hold that the scope of protective orders in civil litigation raises no free speech concerns. Rather, courts have continued to recognize after *Seattle Times* that, in order to protect the public interest in the operation of the court system, that there is a presumption of openness in court materials, even discovery materials. *See, e.g., Citizens First National Bank of Princeton v. Cincinnati Insurance Company*, 178 F.3d 943, 946 (7th Cir. 1999), *citing Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 475-76 (9th Cir. 1992); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 788-90 (1st Cir. 1988); *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162-64 (6th Cir. 1987). The Supreme Court in *Seattle Times* itself recognized that the considerations that go into a Court's exercise of its discretion in entering a Rule 26 protective order involve free speech concerns, and that the entry of such orders must further an important government interest and impose limits "no greater than is necessary or essential to the protection of the particular government interests involved. 467 U.S. 32; 467 U.S. at 37 (Brennan, J. concurring).

Recently, in *Exum v. United States Olympic Committee*, 209 F.R.D. 201 (D. Colo. 2002), the district court held that the press had a right to intervene and be heard on the issue of whether to grant the protective order sought by the USOC covering documents

generated in connection with drug testing of athletes. The Court held that the press met both prerequisites for standing: injury in fact and potential for redress. The protective order would impede the press's ability to report the news (injury in fact) and a denial of the protective order sought by the USOC would provide redress because the parties would then be able to exercise their First Amendment right to disseminate information obtained in discovery. *Exum*, 209 F.R.D. at 205. The *Exum* case clearly supports granting the Media Intervenors' request to intervene.

II. PRIVACY CONCERNS ARE ALREADY ADDRESSED IN THIS COURT'S ORDERS AND DO NOT OUTWEIGH THE PUBLIC'S INTEREST.

A. No Constitutional Right in Financial Privacy. The Bank Defendants invoke the right of privacy to justify their argument for a protective order that would allow them to keep hidden from the public the documents and information relevant to understanding what happened with Enron. While the principles surrounding an individual's[3] right of privacy have some relevance here, when considered, they do not have the effect that the Bank Defendants hope to accomplish.

While the Bank Defendants repeatedly refer to the right of privacy as being a "constitutional" right, they cite no authority at all in support of this contention. The

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[3] The Bank Defendants cannot be asserting any right to privacy for themselves or other corporate entities. The U.S. Supreme Court long ago decided that corporations have no right of privacy:

> [N]either incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret. . . . While they may and should have protection from unlawful demands made in the name of public investigation . . . [c]orporations can claim no equality with individuals in the enjoyment of a right to privacy . . . .They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. . .Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

United States v. Morton Salt Co., 338 U.S. 632, 638; 70 S. Ct. 357, 368 (1950) (citations omitted).

United States Constitution of course never refers to such a right, and the few cases recognizing a *constitutional* right of privacy have extended that right only to certain zones of privacy involving the most significant and personal matters such as marriage, procreation, contraception, family relationships, child rearing, and education. *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-53 (1973), and cases cited therein. The Bank Defendants cite no authority for the proposition that there is a constitutional right of privacy in information about a person's finances and business transactions.

B. Any Common Law Privacy Concerns Outweighed by Legitimate Public Interest. While Texas common law does recognize a common law right of privacy, that right has well-circumscribed limits. A privacy right in information is not presumed; it must be proven to exist by the person asserting the right. *See Industrial Foundation of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682-83 (Tex. 1976) ("*Industrial Foundation*"). That right attaches only to the "highly intimate or embarrassing facts about a person's private affairs, such that its publication would be highly objectionable to a person of ordinary sensibilities." *Industrial Foundation*, 540 S.W.2d at 683. It does not apply generally to all information that a person might simply prefer to keep hidden.

More importantly, the privacy right extends only to facts that are <u>not</u> of legitimate interest to the public. *Id.* at 685. *See, e.g., Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 59 (Tex. App. – Corpus Christi 2001, no pet.) (possible commission of a crime and the resulting consequences are events of legitimate public concern). Even where information might otherwise be considered private, legitimate public interest can override those individual privacy interests. *See, e.g., Ross v. Midwest Communications*, 870 F.2d 271, 273 (5th Cir. 1989) (rape victim's interest in privacy overcome by public interest in

accuracy of rape conviction); *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980) (where private facts about home life published in autobiography were of legitimate public interest, summary judgment in privacy claim proper). In this case, the public interest in the facts surrounding the Enron catastrophe and the individuals involved in that catastrophe are of overriding public concern.[4]

Indeed, as the briefing before the Court shows, when a party becomes involved in litigation the activities in that litigation, the pleadings and other judicial records, are subject to a presumption of access, and a similar presumption of freedom of use of the information (and, therefore, no claim of privacy) arises in the discovery process associated with the civil litigation. So not only is there not a constitutional right of privacy implicated in this litigation, the constitutional interest in access and openness argues against any alleged "constitutional right of privacy" connected with financial documents and information provided in the course of discovery in litigation.

The Court has already addressed, in its General Order 2002-9, the legitimate privacy interests at stake: it properly protects individuals' social security numbers, names of minor children, dates of birth, and financial account numbers from discovery. General Order 2000-9 (July 22, 2002). There is no need for an additional protective order, let alone an umbrella protective order, to keep such information from being publicly disclosed. The substantive information contained in the documents to be produced is of overwhelming interest to the public. The Court, in exercising its discretion

[4] For example, here there are allegations of personal benefit by some of the individual defendants through corporate machinations as well as claims of participation in some of these actions by Bank Defendants. These claims would make personal financial information of the individual defendants and information about the Bank Defendants' conduct matters of legitimate public concern and, therefore, not actionable under a common law invasion of privacy claims if discussed in a news story.

in deciding whether good cause exists to enter any protective order, should see that the actual scope of the limited right to privacy under Texas law does not require the entry of an umbrella protective order and in fact argues strongly against such an order.

III. THE DEFENDANTS HAVE NOT ESTABLISHED THAT THE INFORMATION ALREADY ORDERED DISCOVERED IS CONFIDENTIAL.

Enron makes no substantive reply to the Media Intervenors' observations concerning the documents it produced to the government: documents this Court has now ordered produced to Plaintiffs.

The Bank Defendants have made the broad assertion that production of documents under government compulsion does not waive confidentiality. The Bank Defendants do not provide any authority for this proposition. The Media Intervenors' argument is somewhat different: the Media Intervenors assert that since government officials have seen the information and have used it for decisions concerning government policy and government action, that those documents should be available to the public to evaluate that governmental activity in light of the substantive information reflected in the documents. That legitimate public interest prevails unless there is some showing that Enron maintained the confidentiality of the information it supplied to the government. To date there has been no indication that there was any effort to maintain the confidentiality of the material provided to the government. Indeed, in some instances the Enron board made the specific decision to make public some of the material already provided to government agencies.

Because it is Enron's burden to show good cause why a protective order should be entered, where the documents have already been disclosed to entities that will be making

some of the most critical decisions concerning Enron and the activities of those connected with the Enron situation, there seems little basis to claim that the public should not be entitled to the same information.

IV. ANY CONFIDENTIALITY ORDER SHOULD CAREFULLY LIMIT WHAT MAY BE HIDDEN FROM THE PUBLIC.

In the Media Intervenor's original brief they argued that the Court should not impose any confidentiality order on materials already supplied by Enron to the government and for which the Court has already ordered discovery in favor of Plaintiffs. Media Intervenors still believe that that is an appropriate order for the Court to enter, but in the earlier brief the Media Intervenors deferred any substantive comment on the form of any order that might apply to other discovery since that discovery had not yet taken place. But in the Court's recent Order Establishing Document Depository (Docket No. 1116, October 31, 1002), it indicated that items deposited into the Document Depository would be subject to the Court's General Order 2002-9 requiring the removal of certain account information and other identifying information from materials produced electronically, and further indicated that the Court intended to enter a confidentiality order to govern the documents placed into the Document Depository. Order on Document Depository (Docket No. 1116), p. 14-15 and note 4. Since it appears that the Court is intending to address the confidentiality issues on a general basis now, the Media Intervenors have some observations.

Media Intervenors agree with the Lead Plaintiff that production of the documents that Enron previously produced to various government agencies and Congress and that the Court has ordered placed into the Document Depository should be produced without any confidentiality order attaching to those documents except the Court's General Order

2002-9, an order that Media Intervenors accept as appropriate and to which Media Intervenors have no objection.

For production beyond that already ordered by the Court, Intervenors strongly urge the Court to deny Enron's motion to treat all such discovery as confidential. There clearly is a substantial amount of information in that production that would not be considered confidential under anyone's standard. Such a broad reaching order would be antithetical to the principles of openness that have already been explained to the Court, as well as perpetuating the distrust and suspicion that the Enron situation has generated among investors and the general public.

Because of the Court's General Order 2002-9, the documents must be reviewed anyway to remove the information protected by that order. If such a review is inevitable, then one of Enron's main arguments for a blanket confidentiality order where all documents produced are confidential—that there may be unreviewed but confidential documents in its production—does not apply.

The Bank Defendants and others argue for a protective order allowing producing parties to self-designate confidential documents with the option to challenge that designation. If the Court determines that confidentiality may be asserted by self-designation, any self-designation claiming confidentiality should be made with circumspection and care so as not to deny to public access information that would be helpful to public understanding without compromising legitimate interests in confidentiality. Any such order should be accompanied by strong language requiring the parties to apply that "confidential" designation sparingly with sanctions a serious and likely result in the event of a showing of indiscriminate or inappropriate use of the

"Confidential" stamp. The order should contain a procedure to allow a party to challenge the confidentiality designation and have the opportunity for the Court, a Magistrate, or a Master that may be appointed by the Court to determine whether the confidentiality designation should be lifted in a process that operates in a timely fashion to resolve confidentiality disputes in as open a forum as possible. The order should provide that upon any challenge to a confidentiality designation, the Court will:

(1) apply a strong presumption of non-confidentiality and public access;

(2) impose the burden of proving confidentiality on Enron (or other producing parties);

(3) require specific, individualized proof that confidentiality of particular documents has been maintained by the producing party and must be maintained by the Court to protect ongoing business;

(4) require an individualized determination by the Court as to the confidentiality of documents, not categorical determination of broad description of types of documents;

(5) limit any claims of confidentiality to:

(a) information from third parties that the party is required by law to keep confidential;

(b) information that contains bona-fide trade secrets; and

(c) "highly intimate or embarrassing facts about a person's private affairs, such that its publication would be highly objectionable to a person of ordinary sensibilities." *Industrial Foundation*, 540 S.W.2d at 683, in which there is no legitimate public interest.

(6) impose sanctions for improper designations of confidentiality not in accordance with the Court's order.

CONCLUSION

The Media Intervenors do not oppose the Lead Plaintiff's motion that all discovery occur without any confidentiality order, but if the Court does impose a confidentiality order it should be very limited, with a view to maximizing public information about Enron, the events surrounding its demise, and this case. The materials provided by Enron to various government officials should be produced with no confidentiality beyond what may be required by General Order No. 2002-9. Any additional discovery should have either no protective order other than General Order 2002-9 or, if the Court believes an order necessary, should be narrowly circumscribed to provide the maximum transparency for this proceeding.

Respectfully Submitted,

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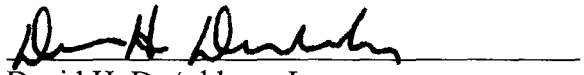
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY BRIEF OF DOW JONES & CO., INC., THE NEW YORK TIMES CO., THE WASHINGTON POST, USA TODAY, THE HOUSTON CHRONICLE, ABC, AND THE REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF MOTION TO INTERVENE AND ON PROTECTIVE ORDER ISSUES has been served by sending a copy *via* electronic mail to serve@esl3624.com on the 2d day of December, 2002.



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SUPPLEMENTAL CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY BRIEF OF DOW JONES & CO., INC., THE NEW YORK TIMES CO., THE WASHINGTON POST, USA TODAY, THE HOUSTON CHRONICLE, ABC, AND THE REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF MOTION TO INTERVENE AND ON PROTECTIVE ORDER ISSUES has been served *via* UPS on the following parties who do not accept service by electronic mail on the 21 day of December, 2002.

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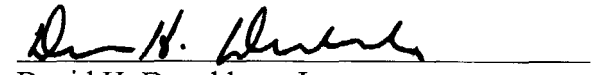

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