

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

United States Courts
Southern District of Texas
ENTERED

DEC 13 2002

Michael N. Milby, Clerk of Court

MARK NEWBY,

Plaintiff,

VS

ENRON CORPORATION, et al.,
Defendants.

Civil Action No. 01-CV-3624

OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF ENRON CORPORATION

Plaintiff,

VS

ANDREW FASTOW, ET AL.

Defendants.

CIVIL ACTION NO. 02-3939

ORDER ON OUTSIDE DIRECTORS' MOTION FOR PROTECTION FROM BANKRUPTCY
RULE 2004 SUBPOENAS

Pending before the Court are motions of current and former outside directors of Enron Corporation¹ to quash the Bankruptcy Rule 2004 subpoenas served upon them by the Official Committee of Unsecured Creditors of Enron Corporation (creditors committee) in the Enron Bankruptcy. The Honorable Arthur J. Gonzalez, Bankruptcy Judge of the Southern District of New York authorized the creditors committee to file these 2004 subpoenas. Subsequent to that authorization, however, the creditors committee filed a lawsuit in Montgomery County, Texas

¹Current and former outside directors filing motions are Robert Al. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, John Mendelsohn, Jerome J. Meyer, Frank Savage, John Wakeham, Charles E. Walker, Herbert S. Winokur, Jr., Jack Urquhart, Ken Rice, and Paulo Ferraz Pereira.

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(Montgomery County lawsuit) against certain officers and inside directors of Enron Corporation. That lawsuit was removed to the Federal District Court, Southern District of Texas and transferred to the docket of the undersigned judge.

The Rule 2004 subpoenas would allow the creditors committee to obtain far reaching discovery from those subject to the subpoena without the procedural safeguards of the discovery rules of the Federal Rules of Civil Procedure. Although there were a number of issues raised in the motions, responses, and reply filed and in the arguments of counsel at the hearing held on the motion, December 5, 2002, it is not necessary to treat these other issues because, at core, the dispute involves a single issue. At the hearing, the parties agreed that Bankruptcy Rule 2004 subpoenas could not be used to obtain discovery from parties “affected by” the litigation. *Snyder v. Society Bank*, 191 B. R. 40 (S. D. Tex. 1994); *In re Szadkowski v. Sweetland*, 198 B. R. 140 (Bankr. D. Md. 1996); *In re the Bennett Funding Group*, 203 B. R. 24 (N.D.N.Y. 1996); *In re 2435 Plainfield Ave.*, 223 B. R. 440 (Bankr. D.N.J. 1998). The parties did not agree that the outside directors were parties “affected by” the litigation, and the resolution of the motion turns upon the determination of the meaning of the phrase.

The creditors committee argues that the outside directors are not affected by the litigation because they have not been sued in the Montgomery County lawsuit. The creditors committee concedes that being a party to a lawsuit is not absolutely essential to the “affected by” status, but the examples given by counsel for the committee did not range far from party status. Counsel for the outside directors argued that the face of the Montgomery County lawsuit itself, when compared to the matters sought by the Rule 2004 subpoenas, establishes that the creditors committee

subpoenas seek discovery focused on Enron's use of its special purposes entities, which is also the focus of the committee's lawsuit.

Enron's use of the special purpose entities also makes up a large portion of the *Newby* and *Tittle* complaints that allege securities fraud, ERISA, and RICO claims against, *inter alia*, the outside directors. The discovery sought by the Rule 2004 subpoenas would also inure to the benefit of J. P. Morgan Chase & Company, a litigant in the *Newby* case and a member of the creditors committee.² If, in the context of a Rule 2004 context, the phrase "affected by" has anything close to a dictionary definition meaning, it is hard to imagine how the outside directors would not be "affected by" the creditors committee's lawsuit, despite their non-party status in that case.

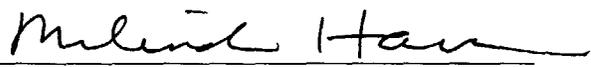
The Court finds that the outside directors are affected by the creditors committee lawsuit. The creditors committee is, therefore, precluded from utilizing Rule 2004 subpoenas against the outside directors. *In re Blinder, Robinson & Co.*, 127 B.R. 267, 275 (Bankr. Colo. 1991). The creditors committee is relegated to the use of the Federal Rule of Civil Procedure for obtaining discovery. This is, of course, a problem for the creditors committee because there is currently a statutory stay on all lawsuit discovery pending a resolution of the motions to dismiss filed in the *Newby* case. *Cf.* Private Securities Litigation Reform Act, Title 15 U.S.C. Sec. 78u-4(b)(3)(B). Be that as it may, the filing of the lawsuit has precluded the use of Rule 2004 discovery and subjected the creditors committee to the stay. Accordingly, it is hereby

ORDERED, ADJUDGED, and DECREED that the Outside Directors' Motion for Protection from Bankruptcy Rule 2004 subpoenas is GRANTED. The creditors committee is

²J. P. Morgan Chase & Company maintains that it was not they who served the subpoenas, but the creditors committee of which, J. P. Morgan Chase & Company concedes, it is a member.

prohibited from seeking further discovery from the Outside Directors without permission of this Court.

Signed at Houston, Texas, this 12th day of December, 2002.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE