United States Courts
Southern District of Texas
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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, DERIVATIVE & "ERISA" LITIGATION	§ § §	MDL 1446
MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants	§ § § § § § § § §	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, ET AL., Plaintiffs VS. ENRON CORP., an Oregon Corporation, ET AL., Defendants	§ § § § § § § § § § § § §	CIVIL ACTION NO. H-01-3913 CONSOLIDATED CASES

MOTION FOR CONFIDENTIALITY ORDER

Defendant Enron Corp. ("Enron"), through its counsel and pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and the Court's December 30, 2002 Order, respectfully requests the Court to designate certain categories of documents as confidential and prohibit disclosure of such documents to third parties. In support of this request, Enron submits the following:

#1201

A. Introduction

The document depository (the "Depository") now available to Plaintiffs in this case includes over thirteen million pages of documents produced by Enron, with approximately three million pages of Enron documents currently being added. This massive production of documents includes data previously produced by Enron to Congress, and a panoply of federal and state agencies, including the FERC, the CFTC, the IRS, the SEC, and the DOJ. The agencies are conducting investigations not only of Enron but of a multitude of individuals and other companies for a broad spectrum of conduct, including securities and commodities trading, rate proceedings, and potential criminal and civil violations unrelated to any claim asserted by Plaintiffs in this case. In order to cooperate and timely comply with all governmental requests related to the investigations, Enron produced a tremendous amount of data – literally millions of pages of documents – to the government, much of which was accorded a presumption of confidential status under applicable governmental regulations. Generally speaking, these documents were turned over rapidly, in their entirety, and without specific review for the confidential or competitively sensitive nature of the information provided.

Included within these documents are the following categories of confidential commercial information: (1) personnel files and documents related to Enron employees who are not defendants in this litigation or otherwise known targets of any investigations; (2) claims analyses or factual and legal positions concerning active claims or disputes, the disclosure of which would compromise Enron's ability to effectively litigate such claims; (3) information pertaining to certain asset sales and bids that could impact Enron's

reorganization plan; and (4) competitively sensitive and/or privileged information related to contracts and trading relationships with various counterparties.

On December 30, 2002, in response to a letter inquiry from Enron's counsel seeking clarification of the Court's previous rulings about producing confidential documents, the Court ordered Enron to file an appropriate motion to protect the confidentiality of any information Enron claims is confidential. Accordingly, Enron moves herein for an order designating documents pertaining to the above narrowly limited categories of information (the "Confidential Information") as confidential and preventing disclosure of the Confidential Information to nonparties as set forth in the proposed Confidentiality Order, attached hereto as **Exhibit A**. Given the tremendous volume of the documents it has provided, Enron further requests that it be allowed a period of 90 days to review the millions of pages of documents in the Depository to identify and designate the specific documents that fall into these narrow categories of Confidential Information. Enron further requests that in the interim, the Court extend its order prohibiting plaintiffs from disseminating Enron's documents to nonparties.

B. Argument

1. The Court Has Discretion To Prevent Disclosure Of Confidential Information To Nonparties On A Showing Of Good Cause.

Federal Rule of Civil Procedure 26(c) provides that a court may, for "good cause shown . . . make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199, 2209 (1984). The Rule expressly provides that a court may order

that "confidential research, development, or commercial information not be revealed or be revealed only in a designated way." FED. R. CIV. P. 26(c)(7) Under Rule 26(c)(7), "commonly[] the trial court will enter a protective order restricting disclosure to counsel or to the parties themselves." *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 362 n.24 (1979); *see also In re Consumers Power Company Sec. Lit.*, 109 F.R.D. 45 (E.D. Mich. 1985) (rejecting challenge to protective order prohibiting disclosure to third parties in securities action brought against public utility). In determining whether good cause exists for the issuance of a protective order limiting disclosure of information to the parties, courts balance the nonparties' "asserted right of access against the other parties' interest in keeping information confidential." *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787-88 (3rd Cir. 1994) (listing several factors to consider in this balancing).

The First Amendment does not require "heightened scrutiny" of the request for a protective order such as the Confidentiality Order attached hereto. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 36; *see also United States v. $9,041,598.68*, 976 F. Supp. 654, 656-657 (S.D. Tex. 1997) ("[V]alid orders pursuant to Rule 26(c) sufficiently protect the press's interests and do not violate the First Amendment."). Because discovery materials "are not public components of a civil trial" and therefore do not "fall within the scope of the constitutional right of access's compelling interest standard," the First Amendment "right to access standard is identical to the Rule 26 good cause standard." *Bridgestone/Firestone*, 263 F.3d at 1310 & n.6, 1315 (citing *Seattle Times Co.*, 467 U.S. at 33).

As demonstrated below and by the Affidavit of Enron Managing Director Robert C. Williams, attached hereto as **Exhibit B**, good cause exists for the Court to grant a Confidentiality Order designating certain documents pertaining to specified categories of information as confidential and prohibiting disclosure of such documents to nonparties.

2. All Confidential Personnel Information Should Be Protected From Disclosure To Third Parties.

Enron seeks to protect the confidentiality of personnel files and documents related to current and former Enron employees who are not parties to this litigation or otherwise targets of ongoing investigations. These files contain private personal information such as salary, social security numbers, unlisted addresses and telephone numbers, marital status, medical backgrounds, credit histories and performance evaluations. Williams Aff. at ¶ 9.

A protective order such as the attached Confidentiality Order is appropriate to ensure the privacy of such confidential personnel information. *See Knoll v. American Telephone and Telegraph Co.*, 176 F.3d 359, 365-366 (6th Cir. 1999) ("It is clear that defendants had a valid interest in the privacy of nonparty personnel files and that it was within the district court's power to grant the challenged protective order."); *Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1384 (5th Cir. 1980) ("[W]hen a trial court orders production of confidential [personnel] records, it has a duty to limit the availability of the documents by carefully drawn protective provisions."); *Glenn v. Williams,* 209 F.R.D. 279 (D.D.C. 2002) (ordering that protective order be extended to include personnel files); *Walters v. Breaux*, 200 F.R.D. 271 (W.D. La. 2001) (ordering that all personnel information "must be kept confidential and used only for purposes of this litigation and must not be disclosed to anyone except parties to this litigation").

Courts have recognized that "harm and harassment" may result from public revelation of the "highly personal information" contained in personnel files, such as "an individual's unlisted address, and telephone number, marital status, wage information, medical background, credit history (such as requests for garnishment of wages), and other work-related problems." *Knoll*, 176 F.3d at 365. Similarly, the Fifth Circuit has recognized that information contained in personnel files, such as "physical or emotional handicaps" or "dissatisfaction with present employment," would be "embarrassing or denigrating to reveal" and might "disqualify[] an applicant for certain [future] employment." *Carr v. Monroe Mfg. Co.*, 431 F.2d 384, 390 (5th Cir. 1970).

The harm that could befall nonparty employees of Enron as a result of public disclosure of their personnel files is, at a minimum, the type of "annoyance [and] embarrassment" Rule 26(c) seeks to prevent. Moreover, such harm easily outweighs any public interest in this specific category of documents. Accordingly, Enron requests the Court to designate categorically all such personnel information of nonparty Enron employees as confidential and to prevent its disclosure to nonparties as provided in the attached Confidentiality Order.

3. Designated Documents Containing Information That Will Compromise Enron's Ability To Resolve Claims Against Third Parties Should Be Protected From Disclosure.

Collectively, Enron's retail and wholesale commodity contracts likely constitute the largest remaining asset of the bankruptcy estates of Enron and its related debtor entities. Williams Aff. at ¶ 9. These contracts, which have an estimated aggregate value to Enron of several billion dollars, are currently in the process of being settled where possible, and litigated as necessary. *Id.* Included in the Depository are analyses of these

claims, as well as descriptions of factual and legal positions relative to active claims or disputes, the disclosure of which would compromise Enron's ability to effectively litigate claims against counterparties. *Id.* If these claims are compromised by the disclosure of this sensitive information, the money due to Enron's estate will be diminished. *Id.* In essence, there will be less available for Enron's creditors, potentially including Plaintiffs to this litigation.

As an example of the type of information contained in the Depository, in Enron's dispute with Pacific Gas & Electric Company ("PG&E") in which Enron is seeking hundreds of millions of dollars in underpayments that Enron is entitled to collect from PG&E under California's energy regulatory scheme, Enron and its legal counsel have performed numerous legal and factual analyses. Williams Aff. at ¶ 11. PG&E is clearly not entitled to these documents. However, because Enron has produced these documents to the FERC, they are contained within the Depository. *Id.* When provided to the FERC, Enron's documents were accorded a presumption of confidentiality under Department of Energy guidelines. *See* 18 C.F.R. sec. 1b.9. Absent a confidentiality order in this case, Enron will not be able to prevent Plaintiffs from posting this sensitive information on their web site where PG&E will have ample opportunity to read it. Such disclosure would severely compromise Enron's ability to litigate, or otherwise resolve, the PG&E conflict as well as numerous other legal matters in which Enron is involved. Williams Aff. at ¶ 10.

Where, as in the above example, public disclosure of a document will compromise a party's litigation position against third parties, good cause exists to protect the confidentiality of such documents. *See Phillips ex rel. Estates of Byrd v. General*

Motors Corp., 307 F.3d 1206 (9th Cir. 2002) (reversing district court decision to lift a protective order preventing disclosure to nonparties with respect to settlement agreements); *cf. Hasbrouck v. BankAmerica Housing Servs.*, 187 F.R.D. 453, 455 (N.D.N.Y. 1999) (issuing protective order preventing disclosure to opposing party of terms of settlement agreement).

Because the resulting harm from public disclosure of this category of documents easily outweighs any public interest in the information, Enron requests the Court to order that such designated information is confidential and to prevent its disclosure to nonparties as indicated in the Confidentiality Order attached hereto as **Exhibit A**.

4. Designated Documents Containing Information that Could Jeopardize Pending Asset Sales and Current Bid Structures Should be Protected from Disclosure.

Enron's bankruptcy has generated a number of bidding structures and asset sales necessary to keep the company operating and, if possible, capable of reorganizing to continue doing business as a going concern. Williams Aff. at ¶ 12. Documents pertaining to the assets being marketed, as well as current bid structures being negotiated, should be protected from disclosure.

One such asset is Portland General. Its proprietary negotiating positions and market analyses have been produced to the government. Williams Aff. at ¶ 13. The value of Portland General as a going concern would be reduced if this information were made public. *Id.* The same is true for many of the other operating entities for which the estate is in the process of trying to obtain value. *Id.*

A protective order such as the attached Confidentiality Order is necessary to ensure that confidential information is not used to undermine Enron's asset sale negotiations and final sales, or its current bid structures for future negotiations and sales.

See, e.g., *In re Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994) (affirming protective order prohibiting disclosure of existing license agreement because disclosing the "overall structure, terms and conditions of the [] agreement, renders very likely a direct and adverse impairment to Orion's ability to negotiate favorable promotion agreements . . ., thereby giving Orion's competitors an unfair advantage"); *In re the Frontier Group, L.L.C.*, 256 B.R. 771 (Bankr. E.D. Tenn. 2000) (approving protective order prohibiting disclosure of debtor's primary asset); *FDIC v. Schoenberger*, 1990 WL 52863, at *1 (E.D. La) (issuing protective order prohibiting disclosure of information "relating to the appraised value of assets" of estate); *In re Apex Oil Co.*, 101 B.R. 92 (Bankr. E.D. Mo. 1989) (rejecting newspaper's request for access to report detailing debtor's assets); *In re Nunn*, 49 B.R. 963 (Bankr. E.D. Va. 1985) (issuing protective order to prohibiting disclosure of debtor's asset).

Indeed, because of the particularly sensitive nature of a debtor's commercial information and the likelihood that release of such information would harm the debtor in the reorganization process, bankruptcy law (11 U.S.C. 107(b)) essentially presumes the existence of good cause with respect to a debtor's commercial information and *requires* a bankruptcy court to issue a protective order prohibiting disclosure of such information at the debtor's request. *See In re Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994) ("In the bankruptcy area, however, Congress [in 11 U.S.C. 107(b)] has established a special rule for trade secrets and confidential research, development, and commercial information. . . . Thus, if the information fits any of the specified categories, the court is *required* to protect a requesting interested party and has no discretion to deny the application."); *see also* FED. R. BANKR. 1009(j) ("On motion of a party in interest and for

cause shown the court may direct the impounding of the [asset] lists filed under this rule, and may refuse to permit inspection by any entity."). Congress has thus determined that good cause exists to protect the confidentiality of those designated documents pertaining to such asset sales.

5. Designated Documents Containing Competitively Sensitive And/Or Privileged Information Related To Contracts And Trading Relationships Should be Protected From Disclosure To NonParties.

Enron is party to hundreds of retail and wholesale commodity contracts and trading relationships with scores of counterparties. Williams Aff. at ¶ 14. Included in the Depository are proprietary materials related to such contracts and trading relationships, including contractual term and rate information, database information detailing transactional data for all of Enron's natural gas, energy, and other commodity trades, information as to how Enron analyzes markets, Enron trading and risk management strategies, and other information subject to confidentiality agreements with third parties. Williams Aff. at ¶¶ 14-17. Public disclosure of such information would place Enron, and potentially its counterparties, at a competitive disadvantage. *Id.*

For example, competitors or trading partners of Enron could use Enron's proprietary information to Enron's disadvantage. Enron and its largest assets continue to operate as going business concerns under the bankruptcy laws. *Id.* Additionally, Enron continues to hold approximately a 33% interest in the profits of its former trading business, which is now operated by UBS AG. Williams Aff. at ¶15. Accordingly, not only would Enron and its creditors be harmed if its confidential and proprietary business information were disclosed, but also third parties with whom Enron currently does business may be harmed as a result of the release of proprietary information regarding such commercial trading. Williams Aff. at ¶¶ 14-17.

A protective order, such as the attached Confidentiality Order, is appropriate to ensure that confidential commercial information of Enron and its counterparties is not used by nonparties to gain a competitive advantage. *See Nixon v. Warner Communications*, 435 U.S. 589, 598, 98 S. Ct. 1306, 1312 (1978) ("[C]ourts have refused to permit their files to serve as . . . sources of business information that might harm a litigant's competitive standing."); *Vollert v. Summa Corp.*, 389 F.Supp. 1348 (D. Hawaii 1975) (protecting disclosure of financial records detailing capitalization, net worth, and annual income); *Spartanics, Ltd. v. Dynetics Eng'r. Corp.*, 54 F.R.D. 524 (N.D. Ill. 1972) (limiting disclosure of market entry data); *Corbett v. Free Press Assoc.*, 50 F.R.D. 179 (D. Vt. 1970) (limiting disclosure of profit and gross income data); *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308 (E.D. Pa. 1969) (limiting disclosure of terms of contract); *Hecht v. Pro-Football, Inc.*, 46 F.R.D. 605 (D.D.C.1969) (limiting disclosure of financial data).

Because the resulting harm from public disclosure of Enron's competitively sensitive information easily outweighs any public interest in this particular category of documents, Enron requests the Court to order such designated information confidential and to prevent its disclosure to nonparties pursuant to the Confidentiality Order attached hereto.

6. A Period Of Ninety (90) Days Is Necessary For Enron To Adequately Review And Designate As Confidential Documents In The Depository.

In order to cooperate and timely comply with all governmental investigations, Enron produced millions of pages of documents to the government, without specific review for the confidentiality or competitively sensitive nature of the documents being produced. Williams Aff. at ¶ 18. Assuming the Court finds good cause exists to protect

the categories of documents referenced above, Enron will need to review all documents in the Depository to determine if they fall within one of the enumerated categories. Because of the large volume of documents, Enron requests ninety (90) days for such a review and specific designation, after which time Plaintiffs can disclose the contents of any such documents not designated "Confidential" as provided in the attached Confidentiality Order. *Id.*

C. Conclusion

Good cause exists for the Court to prevent disclosure to nonparties of the following categories of documents: (1) personnel files and documents related to Enron employees who are not defendants in this litigation or otherwise targets of any investigations; (2) claims analyses or inclusions of factual and/or legal positions concerning active claims or disputes, the disclosure of which would compromise Enron's ability to litigate claims against those counterparties; (3) information pertaining to certain asset sales bid structures that could impact Enron's reorganization; and (4) competitively sensitive and/or privileged information related to contracts and trading relationships with various counterparties. The Court should prevent any public disclosure of such information under the procedure set forth in the attached Confidentiality Order, which provides Enron ninety (90) days for review of the documents in the Depository to determine which specific documents should be designated as "Confidential." The Court should further order that none of the documents in the Depository shall be released to any nonparties until after this ninety (90) day period.

FOR THE FOREGOING REASONS, Enron respectfully requests that this Court grant its Motion for Confidentiality Order, provide Enron ninety (90) days to review and

designate the appropriate "Confidential" documents in the Depository, and order that none of the documents in the Depository shall be released to any nonparties until after this ninety (90) day period.

Respectfully submitted,

Scott D. Lassetter with permission by JBS

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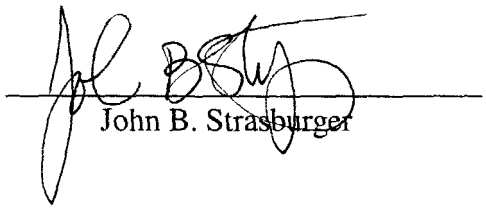
CERTIFICATE OF SERVICE

I certify that on January 3, 2003, the foregoing was served by e-mail or facsimile on the attached service list.

This the 3rd day of January, 2003.



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