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

United States Court
Southern District of Texas
FILED

JAN 10 2003

Michael N. Milby, Clerk

H-01-3624

CIVIL ACTION NO. H-01-3913
AND CONSOLIDATED CASES

PAMELA M. TITTLE, on behalf of herself and
a class of persons similarly situated, *et al.*,

Plaintiffs,

v.

ENRON CORP., an Oregon Corporation, *et al.*,

Defendants.

**RESPONSE OF CERTAIN COMMITTEE DEFENDANTS
TO ENRON'S MOTION FOR CONFIDENTIALITY ORDER**

Certain former members of the administrative committees for the Enron pension plans (the "Committee Defendants")¹ respectfully submit this response to Enron's motion for a confidentiality order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. The Committee Defendants request that their confidential personnel files and documents be accorded the same protection as the personnel files and documents of other current and former Enron employees, including the plaintiffs. Counsel for Enron has authorized the Committee Defendants to state that it supports this modification of its proposed protective order.

In its motion, Enron seeks confidential treatment of the personnel files and documents related to current and former Enron employees because "[t]hese files contain private personal

¹ These Defendants are Philip J. Bazelides, Keith Crane, William Gulyassy, Rod Hayslett, Mary K. Joyce, Sheila Knudsen, Tod A. Lindholm, James S. Prentice, Paula Rieker, and David Shields. Only Messrs. Hayslett and Ms. Rieker are current Enron employees, and Mr. Lindholm is on medical leave. All of the other Committee Defendants are no longer employed by Enron.

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information such as salary, social security numbers, unlisted addresses and telephone numbers, marital status, medical backgrounds, credit histories and performance evaluations.” Motion at 5. Enron correctly cites Fifth Circuit precedent that a trial court has “a duty to limit the availability” of confidential personnel records through a protective order. *Id.* (citing *Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1384 (5th Cir. 1980)). Neither *Jepson* nor any of the other cases cited by Enron suggested personnel files of named defendants are excluded from the scope of this duty. In fact, the court in *Walters v. Breaux*, 200 F.R.D. 271, 273 (W.D. La. 2001), specifically included personnel files of named defendants in its protective order, noting that “confidential information such as the individual’s salary, benefits, social security number, home address and home phone number and similar information is protected from disclosure under various federal and state statutes” Courts routinely include personal information about defendants within the scope of protective orders. *E.g.*, *Scott v. Edinburg*, 101 F. Supp. 2d 1017, 1022 (N.D. Ill. 2000) (“personal and sensitive information” about defendants produced subject to protective order); *Ragge v. MCA/Universal Studios*, 165 F.R.D. 601, 605 (C.D. Cal. 1995) (same); *Soto v. City of Concord*, 162 F.R.D. 603, 617 (N.D. Cal. 1995) (same).

Consistent with these principles, the Court previously entered two orders in the *Tittle* and *Newby* cases that protect confidential personal information about individual defendants. First, the Order establishing the document depository was expressly “intended to conform to General Order No. 2002-9 dated July 22, 2002 protecting personal privacy and other legitimate interests” – with no exception for the personal privacy of individual defendants. Order Establishing Document Depository, at 14-15 (entered Oct. 31, 2002). General Order No. 2002-9, *In the Matter of Protecting Personal Privacy in Public Case Files*, prohibits inclusion in all filings of certain personal identifiers including social security numbers, names of minor children, dates of

birth (except the year of birth), and financial account numbers (except the last four digits) – with no exception for personal identifiers of any party. Second, the Court ordered both the *Newby* and *Tittle* Plaintiffs to treat as confidential documents produced by Enron on April 8, 2002, “which contain information regarding individual participants in the ERISA-governed benefit plans which should be treated as confidential.”² This Order contains no exception for individual participants who are also defendants, and all of the Committee Defendants are participants in Enron’s ERISA-governed benefit plans.³

However, Enron’s proposed confidentiality order excludes from protection personnel files and documents relating to the Committee Defendants, as well as other named defendants in the *Tittle* or *Newby* cases. There is no justification for putting in the public domain private personal information of *any* current or former employee “such as salary, social security numbers, unlisted addresses and telephone numbers, marital status, medical backgrounds, credit histories and performance evaluations.” See Enron Motion at 5. The mere fact that the *Tittle* plaintiffs chose to name the Committee Defendants as defendants does not deprive them of the protection to which they would otherwise be legally entitled. The Committee Defendants have not been adjudged to have violated any obligation under ERISA,⁴ and even if they had, they would not

² Agreed Order Between Enron Corp., Lead Plaintiffs in *Newby*, and Lead Plaintiffs in *Tittle* Establishing a Protocol Governing Documents Produced by Enron Corp. on April 8, 2002, at 3 (filed April 9, 2002). This Order does *not* provide that this obligation ends when the Court enters a comprehensive order governing the confidentiality of documents. *Ibid.*

³ Consistent with this principle, counsel for the *Tittle* Plaintiffs agreed to treat as confidential documents about all participants in the Enron benefit plans produced by Northern Trust Retirement Consulting, LLC (“NTRC”), the former recordkeeper for the plans. See Letter from counsel for NTRC to counsel for the *Tittle* Plaintiffs dated May 16, 2002) (copy attached as Exhibit 1).

⁴ None of the Committee Defendants is named as a defendant in the *Newby* case, and none is alleged to have engaged in any insider trading. Enron’s proposed order would also exclude from protection personal information about current and former employees who are

thereby forfeit the basic privacy rights that courts, including this Court, have consistently recognized and protected. To produce personal confidential information such as social security numbers and medical information without any protections would violate the Committee Defendants' privacy rights and expose them, in the words of Rule 26(c), to "annoyance, embarrassment, [and] oppression" – including, for example, wholesale identity theft. That is why this Court's General Order, prior protective orders specific to this case, and protective orders routinely entered in other cases include within their scope confidential personal information about defendants.

Two additional points warrant discussion. *First*, protection is particularly appropriate because the personnel files and related information that Enron apparently plans to produce on a wholesale basis contain information not reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs have made no showing that any of the information in the personnel files of the Committee Defendants, including such information as their social security numbers, relates to Plaintiffs' allegations that these Defendants breached their fiduciary duties.⁵ Accordingly, no one who does not otherwise have access to this information has any legitimate interest in access.

Second, no valid basis exists to treat confidential information about individual defendants differently from the same information about individual plaintiffs. Both plaintiffs and defendants are parties, and both types of parties consist of Enron employees and plan participants. The

"known targets of various investigations." Proposed Confidentiality Order at 2 ¶ 3. None of the Committee Defendants is the target of any criminal investigation. They have cooperated with the civil investigation by the U.S. Department of Labor, which has generally agreed to treat as confidential the personal information that they have provided.

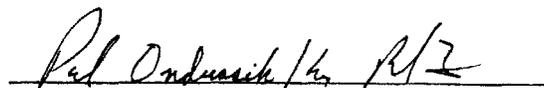
⁵ Despite this overbreadth, the Committee Defendants do not object to the production of these documents – only to their production without a protective order.

Title plaintiffs have sought confidential treatment of their personal information, including their personal finances, and the Committee Defendants have supported that position. If individuals who voluntarily chose to bring this action and to act as class representatives are entitled to protect confidential personal information, so too are the Committee Defendants who are involuntary parties. As explained above in note 3, the *Title* Plaintiffs agreed that information produced by the plans' former recordkeeper about participants should be protected – without any exception for named plaintiffs or defendants.

Pursuant to Local Rule 7.1(D), counsel for the Committee Defendants conferred with counsel for the *Title* Plaintiffs to attempt to reach agreement about protection of confidential personal information about the Committee Defendants. Counsel for the *Title* Plaintiffs stated that these Plaintiffs do not take a position on this issue pending the Court's ruling on Enron's motion. Counsel for the Committee Defendants also conferred with counsel for Enron, and as stated above, Enron agrees that confidential personal information about individual defendants should be protected.

For these reasons, the Committee Defendants respectfully request that the confidentiality order provide the same protection to their personnel files and documents as to the personnel files and documents of other current and former Enron employees.

Respectfully submitted,



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Dated: January 10, 2003

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January 2003, a true and correct copy of the foregoing Response of Certain Committee Defendants to Enron's Motion for Confidentiality Order, and accompanying exhibit was: (1) electronically served to all counsel of record via the www.esl.3624.com <<http://www.esl.3624.com>> web site, pursuant to the Court's Orders of June 5, 2002, and August 7, 2002; (2) sent via Fax Machine to:

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and (3) sent by Federal Express, priority overnight, to:

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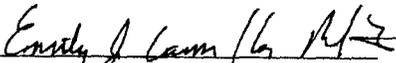
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Emily I. Cann

EXHIBIT 1

CO

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May 16, 2002

Re: Civil Action No. H-01-3913 (Consolidated), *Title v. Exxon Corp.*, In the United States
District Court for the Southern District of Texas, Houston Division.

Mr. Clyde A. Platt
Hagens Berman LLP
1301 Fifth Avenue, Suite 2000
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Mr. Justin M. Campbell III
Campbell Harrison & Dagley, LLP
4000 Two Houston Center
909 Fannin Street
Houston, TX 77010

Dear Counsel:

We are in receipt of plaintiffs' subpoena for the production of documents from our client, Northern Trust Retirement Consulting, LLC ("NTRC"). NTRC has agreed to produce to Plaintiffs' counsel a copy of the documents that it produced to the Department of Labor ("DOL Documents") after execution of this letter agreement, and before it serves and files its responses and objections to the subpoena.

Because the document depository referenced in the Court's Scheduling Order has taken more time to set up than was initially anticipated, we have agreed as follows:

1. NTRC has produced the DOL Documents to IKON to be imaged and Bates numbered by IKON. IKON shall produce to Mr. Campbell, on behalf of the Plaintiffs, the Bates numbered images and one hard-copy set of the DOL Documents. The cost for imaging the DOL Documents and the hard-copy set shall be divided 40/60 between Plaintiffs and NTRC, respectively.
2. Some of NTRC's DOL Documents were marked with the words "Business Confidential/Protected Trade Secret" before they were produced to the DOL. If Plaintiffs believe a document has erroneously been designated confidential, they shall meet and confer with NTRC and such designation shall be deleted if the parties agree, which agreement shall not unreasonably be withheld.
3. The DOL Documents shall be used only for purposes of the consolidated *Title* and *Newby* cases, and, except as provided in paragraph 4, such documents will be made available only to:

Messrs. Platt and Campbell

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- a. Lead co-counsel and members of the Steering Committee in *Title*.
 - b. Lead counsel in *Newby*,
 - c. Counsel of record for the defendants in either *Title* or *Newby*, and
 - d. For each of the foregoing, their respective local counsel, personnel employed by counsel assisting in these consolidated cases, clients, consulting and non-consulting experts, witnesses, court reporters, and the court and its staff.
4. Pending further order of the court or agreement of the parties to this letter agreement, the documents designated by NTRC as containing confidential information shall be made available only to counsel identified in the preceding paragraph 3, personnel employed by said counsel to assist in this litigation, consulting and non-consulting experts, and the court and its staff. Documents designated as confidential, if filed with the court, shall be filed under seal.
 5. Each person identified in paragraph (3) who is given access to the DOL Documents shall sign a form agreeing to use the documents only for purposes of the consolidated *Title* and *Newby* cases, to limit distribution of those documents in accordance with the terms of this agreement and to abide by confidentiality provisions contained in paragraph (4).
 6. This agreement shall govern the DOL Documents until such time as the document depository is established and an order governing the document depository and the confidentiality of the documents produced into the document depository has been entered by the court. At that time, the DOL Documents, including the imaged set, shall be delivered to the document depository by Plaintiffs' counsel, and governed by the terms and provisions of the court's orders with respect thereto. In the event that the order provides for a different allocation of costs than what is provided for in paragraph 1 of this agreement, the parties agree to a reimbursement in accordance with the court's order.
 7. Any privileged document inadvertently produced by NTRC among the DOL Documents shall be returned to NTRC, along with all copies thereof, within five (5) days of a demand for return of such document made by NTRC.

If this letter accurately states our agreement with regard to the production of the DOL Documents, then please execute the duplicate original in the space provided below and return same to me.

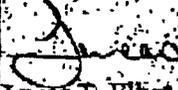
Misses Platt and Campbell

May 16, 2002

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If you have any questions or comments, please do not hesitate to call me. My direct line is 713-651-5417.

Very truly yours,



Lucas T. Elliot

LTE/tcm

HAGENS BERMAN LLP

By 
Clyde A. Platt

On behalf of Plaintiffs' Counsel in the Title Case