

United States Courts
Southern District of Texas
FILED
JR MAY 27 2003

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)

This Document Relates To:

§ CLASS ACTION

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 OF
CALIFORNIA, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

**LEAD PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION
TO THE OUTSIDE DIRECTOR DEFENDANTS' MOTION
FOR PROTECTIVE ORDER**

1434

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8 Wright, Miller & Marcus, *Federal Practice and Procedure Civil 2d* (1994)
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I. INTRODUCTION

Lead Plaintiff submits this memorandum of law in opposition to the Outside Director Defendants' Motion for Protective Order.¹ The Outside Directors agree to produce certain financial information, including "Enron trading entries" and "Enron-related financial documents." Motion at 7. Plaintiffs are amenable to this production so long as it includes *all* Enron-related financial information, including Enron's myriad SPEs, subsidiaries and affiliates, plus stock, option, bonus, or any other remuneration, property, or payments to or from any of these entities or from any defendant in this case, including, without limitation, monies provided to the movants' outside businesses and charities, consistent with Lead Plaintiff's document production Request Nos. 19, 36-37, 43-47.²

Beyond these requested documents, the Outside Directors request the Court to "shield" them from producing any "private information." They request carte blanche to redact personal contact information, account number and other information from "relevant documents," and withhold income tax documents. The Outside Directors want a protective order because contact and income tax information is "irrelevant" and producing this information will subject them to "significant" harassment. The Outside Directors are wrong on all counts.

While supposedly providing independent, good-faith supervision over Enron's corporate affairs, the Outside Directors steered millions of Enron's dollars to their personal and business affiliations. These conflicts were so egregious that in July 2002, Congress issued a finding that the Board was "*compromised by financial ties*" with Enron.³ The Senate Report details numerous examples of profiteering, self-dealing and personal financial aggrandizement at the expense of director independence. Yet in their Affirmative Defenses, the Outside Directors claim they "acted

¹The Outside Director movants include Robert A. Belfer, Norman P. Blake, 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, Charls E. Walker and Herbert S. Winokur, Jr. On May 15, 2003, defendant Lou L. Pai joined in the Outside Directors' Motion, and on May 27, 2003, defendant Paulo V. Ferraz-Pereira joined in the Outside Directors' Motion.

²Lead Plaintiff reserves its right to compel further or additional responses.

³Unless noted otherwise, all emphasis is added and all citations are omitted.

with reasonable care" and "acted in good faith" while year after year, Enron engaged in fraudulent transaction after fraudulent transaction. *See* Outside Directors' Answer (Thirteenth and Thirtieth Affirmative Defenses). It cannot be disputed their Enron-related financial affairs are highly relevant due to their financial conflicts and good faith and due care defenses.

Moreover, the Outside Directors' claims of harassment and privacy concerns are overstated: 14 movants submit *no* evidence of harassment, and *no* movant submits evidence of harassment outside the office. The Enron fraud continues to generate enormous public interest in the United States and around the world. But even with Enron's global impact and unparalleled infamy, the only evidence of "harassment" 16 movants can muster is some e-mails sent to two directors at work. This bald assertion is precisely the type of stereotypical, conclusory statement that falls far short of the Fifth Circuit's and this Court's particularized requirements.

The Outside Directors' Motion suffers from an even more fundamental flaw: it ignores the fact the Southern District of Texas and this Court have on two separate occasions *already* established stringent procedures concerning the protection and use of personal information. These procedures include prohibiting those with access to the document depository from disclosing personal information and prohibiting social security numbers, account numbers, home addresses and similar information from appearing in public pleadings. The Outside Directors fail to make any *specific, factual* showing these procedures are inadequate.⁴ This failure simply does not meet the Fifth Circuit's test for a protective order. Federal Rule of Civil Procedure 26(c) requires a movant to show a "particular and specific demonstration of fact," not "stereotyped and conclusory statements." *In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998). The Court affirmed this view when it denied Enron's "overly broad" motion for a blanket protective order, requiring Enron to set forth "particular

⁴Lead Plaintiff believes the Court's previous orders require all parties to treat personal information confidentially, including redacting this information from public filings and ensuring only those who are entitled to the information are given access to the document depository (unless regulations or statutes require the information be publicly disclosed, *e.g.*, salary and bonus information for directors of public companies). Thus, Lead Plaintiff is required, and hereby agrees, to treat the Outside Directors' personal information confidentially in accordance with the Court's previous orders.

and specific facts that establish good cause (*specific* prejudice or harm from distribution to third parties) for the issuance of a protective order as to each document." March 28, 2003 Order at 3.

In sum, while they claim the requested relief is "very narrow," the order the Outside Directors seek would permit them to withhold critical financial information and key pieces of their Enron communications that occurred outside the office. The Outside Directors simply do not meet the Fifth Circuit's or this Court's heavy burden and their privacy concerns can be addressed through far less drastic measures.

II. THE STANDARD FOR GRANTING PROTECTIVE ORDERS

District courts have broad discretion in fashioning protective orders. Before the Court can exercise such discretion, it must determine whether a protective order is appropriate in the first place – a rigorous analysis the Outside Directors refuse to undertake. A protective order may only be issued upon a showing of good cause. "Rule 26(c)'s requirement of a showing of good cause to support the issuance of a protective order indicates that 'the burden is upon the movant to show the necessity of its issuance, which contemplates a *particular and specific demonstration of fact* as distinguished from *stereotyped and conclusory* statements.'" *Terra*, 134 F.3d at 306. The burden is on the Outside Directors to demonstrate a "*clearly defined and serious injury*" as to "*each and every document sought to be covered*." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-87 (3d Cir. 1994).

Not only do the Outside Directors fail to meet Rule 26(c)'s requirements, they ignore the Supreme Court's and the Fifth Circuit's directives that the federal discovery rules be construed broadly and applied liberally. *See Hickman v. Taylor*, 329 U.S. 495, 508 (1947) ("the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."); *Green v. McKaskle*, 788 F.2d 1116, 1120 (5th Cir. 1986) ("The Federal Rules of Civil Procedure ... instituted a system which relies on a liberal opportunity for discovery"); *Dollar v. Long Mfg.*, 561 F.2d 613, 616 (5th Cir. 1977) (federal discovery rules authorize disclosure of facts "to the fullest practicable extent" and should be construed liberally); *Dunbar v. United States*, 502 F.2d 506, 509-10 (5th Cir. 1974) (same); *Smith v. WNA Carthage, L.L.C.*, 200 F.R.D. 576, 577 (E.D.

Tex. 2001) ("Federal discovery practice is open."). *See also Swierkiewicz v. Soreman*, 534 U.S. 506, 512-13 (2002) (reaffirming the federal discovery rules are "flexible" to avoid surprise and to allow disputes to be "frankly" litigated in open court); *Graham v. Casey's Gen. Stores*, 206 F.R.D. 251, 253 (S.D. Ind. 2002) ("Even after the recent amendment to [Rule 26], courts employ a liberal discovery standard."); 8 Wright, Miller & Marcus, *Federal Practice and Procedure Civil 2d* §2007, at 94 (1994) ("The rule does allow broad scope to discovery and this has been well recognized by the courts."). Thus, both the Supreme Court and the Fifth Circuit favor the disclosure of *all* factual information to the "fullest extent."

III. **OUTSIDE DIRECTORS' REQUESTED PROTECTIVE ORDER SHOULD BE DENIED**

A. **The Court Has Already Addressed Outside Directors' Privacy Concerns and They Fail to Comply with the Court's Previous Orders**

The Outside Directors fail to address the stringent procedures *already* in place to safeguard the information at issue. General Order No. 2002-9 requires all parties to redact from public pleadings personal information, including social security numbers, names of minor children, dates of birth, and financial account numbers. The Southern District of Texas admonished parties to use care in handling such information:

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review each pleading for compliance with this rule. Counsel and the parties are *cautioned that failure* to redact these personal identifiers may subject them to appropriate *disciplinary proceedings*.

In the Matter of Protecting Personal Privacy in Public Case Files, Gen. Order No. 2002-9, at 2 (S.D. Tex. July 22, 2002). In denying Enron's request for a blanket confidentiality order, the Court ordered *additional* safeguards for personal information:

Enron's personnel files shall be produced in the spirit of General Order No. 2002-9; *social security numbers*, names of minor children, dates of birth, *financial account numbers*, drivers licence numbers, *unpublished addresses*, *types of financial accounts*, *individual portfolio statements*, *individual account statements*, medical histories, sexual harassment allegations, and *credit histories* in the personnel files *shall be deemed confidential and shall not be disclosed by any person given access to the documents in the document depository*.

March 28, 2003 Order at 3. Lead Plaintiff understood these procedures applied equally for *all* Enron personnel, including the Outside Directors, and Lead Plaintiff agrees to keep such personal information confidential.

To obtain a protective order, the Court wrote the moving party must "set[] forth particular and specific facts that establish good cause (specific prejudice or harm from distribution to third parties) for the issuance of a protective order as to each document." *Id.* The Outside Directors claim their Motion is consistent with the Court's December 19, 2002 Order, in which the Court refused to impose a blanket protective order and required defendants to "show that good cause exists" and to "move in good faith for a particularized protective order." December 19, 2002 Order at 5, 7. However, the Outside Directors fail to demonstrate how production of responsive documents will result in "specific prejudice or harm." March 28, 2003 Order at 3. The Outside Directors should know Lead Plaintiff agreed to treat personal information in confidence. At the March 27, 2003 hearing on Enron's motion for a blanket confidentiality order, Lead Counsel stated on the record, "we will abide by General Order 2002-09." Hearing Tr. 68:22-23. And the Court's March 28, 2003 Order requires plaintiffs to treat as confidential the information the Outside Directors seek to protect. Thus, the safeguards in place are more than sufficient to address the Outside Directors' stated concerns. Responsive documents should be produced; they will be accorded the appropriate confidentiality. There is no valid reason for refusing to produce the documents.

B. The Outside Directors' Significant Financial Entanglements and Affirmative Defenses Require the Production of Financial Information

1. Outside Directors Seek to Withhold Relevant Documents

Movants claim they will produce "discovery of their trades in Enron securities, or other Enron-related financial documents" and "produce documents containing Enron trading entries or related documents." Motion at 7. Plaintiffs are amenable to this proffer so long as the Outside Directors agree to produce *all* financial documents and account statements, account numbers, and current amounts and current locations of proceeds or distributions arising from *any* business or

personal relationship or affiliation with any defendant in this case, Enron, or any of Enron's SPEs, subsidiaries, affiliates or other Enron-controlled or sponsored entities.⁵

Contrary to their claim that Lead Plaintiff's discovery will not lead to relevant information, the Outside Directors' significant financial conflicts and Affirmative Defenses make their personal, Enron-related financial information highly relevant. They steered millions of Enron's dollars to their business and personal affiliations – and did so while purportedly providing independent oversight of Enron's corporate affairs. These conflicts were so damning that Congress found, "The *independence* of the Enron Board of Directors was *compromised by financial ties* between the company and certain Board members." The Role of the Board of Directors in Enron's Collapse, Permanent Subcommittee on Investigations, at 51 (July 8, 2002) (Ex. 1 hereto). The Report goes on to detail certain of the financial conflicts:

- Since 1996, Enron paid a monthly retainer of \$6,000 to **Lord John Wakeham** for consulting services, in addition to his Board compensation. In 2000, Enron paid him \$72,000 for his consulting work alone.
- Since 1991, Enron paid **John A. Urquhart** for consulting services, in addition to his Board compensation. In 2000, Enron paid Mr. Urquhart \$493,914 for his consulting work alone.
- **Herbert Winokur** also served on the Board of the National Tank Company. In 1997, 1998, 1999, and 2000, the National Tank Company recorded revenues of \$1,035,000, \$643,793, \$535,682 and \$370,294 from sales to Enron subsidiaries of oilfield equipment and services.
- In the past five years Enron and Kenneth Lay donated nearly \$600,000 to the M.D. Anderson Cancer Center in Texas. In 1993, the Enron Foundation pledged \$1.5 million to the Cancer Center. **Dr. LeMaistre** and **Dr. Mendelsohn** have served as president of the Cancer Center.
- Since 1996, Enron and the Lay Foundation have donated more than \$50,000 to the George Mason University and its Mercatus Center in Virginia. **Dr. Wendy Gramm** is employed by the Mercatus Center.
- Since 1996, Enron and Belco Oil and Gas have engaged in hedging arrangements worth tens of millions of dollars. In 1997, Belco bought Enron affiliate Coda Energy. **Robert Belfer** is former Chairman of the Board and CEO of Belco.
- **Charls Walker**, a noted tax lobbyist, was a director from 1985 until 1999. In 1993-1994, Enron paid more than \$70,000 to two firms, Walker/Free and Walker/Potter that were partly owned by Mr. Walker, for governmental relations and tax consulting services. This sum was in addition to Mr. Walker's Board compensation. Enron was also, for more than 10 years ending in 2001, a major contributor of up to \$50,000 annually to the American Council for

⁵Lead Plaintiff reserves the right to compel further or additional documents or categories of information.

Capital Formation, a non-profit corporation that lobbies on tax issues and is chaired by Mr. Walker.

Id. at 52-52. Dismayed by the breadth of these conflicts, one Senator remarked:

[E]ven though a majority of Enron's board was made up of outside directors, meaning directors not in Enron's management, ***a stunning 10 of the 15 most recent outside Directors had conflicts of interest***, including contracts with Enron, common ties or contributions to charities, and memberships on the board of other companies doing business with Enron.

For example, charities close to some of the Directors were supported heavily by Enron and its officers. Two Directors earned more than \$6.5 million in consulting fees from Enron since 1991. One Director served on the board of a company that in 1999 signed a \$1 billion energy management agreement with an Enron affiliate.

* * *

To me, the Directors' lack of due diligence is even more troubling in light of the fact that some of them profited so much from their positions as Board members. In stock sales alone ... some made hundreds of thousands of dollars and a few made more than one million. ***The Board of Directors did not just fiddle while Enron burned some of them, some of them toasted marshmallows over the flames***

Ex. 2.

In addition, plaintiffs allege certain of the Outside Directors pocketed enormous sums while dumping their Enron shares on the open market.

Director	Shares Sold	Proceeds
Belfer	2,065,137	\$111,941,200
Blake	21,200	\$1,705,328
Chan	8,000	\$337,200
John Duncan	35,000	\$2,009,700
Foy	38,160	\$1,639,590
Gramm	10,328	\$278,892
Jaedicke	13,360	\$841,438
LeMaistre	17,344	\$841,768
Pai	3,912,205	\$270,276,065

Given this web of profiteering, self-interested transactions and stock sales, the Outside Directors' argument that their individual financial information is irrelevant rings hollow. Plaintiffs are entitled to know into which accounts Enron-related cash – whether disclosed or not – was

transmitted. If a director received wire payments from an illicit Enron SPE to a director's account in a known tax fraud haven, or if these monies were wired to offshore accounts, or if these funds were transferred to family members, the information is relevant. Absent account numbers and other critical identifying information, the fact-finder will never have an accurate picture of what transpired. Thus, discovery concerning the Outside Directors' Enron-related financial affairs is relevant and necessary. *See NLRB v. Leland Stanford Junior Univ.*, 715 F.2d 473, 474 (9th Cir.1983) (a broad discovery standard is used for relevance).

Courts permit discovery into these matters. *See Resolution Trust Corp. v. Walde*, 18 F.3d 943, 947 (D.C. Cir. 1994) ("personal financial information ... is reasonably relevant to the potential liability of officers and directors. Bank statements of officers and directors, for example, *might reveal secret payments*"); *Rorer Int'l Cosmetics, Ltd. v. Halpern*, 85 F.R.D. 43, 45 (E.D. Pa. 1979) (in securities fraud suit, plaintiffs are "permitted to investigate defendant's bank records to ascertain whether they *reveal any evidence of kickbacks*"); *Kippur v. Bernstein*, No. 90 Civ. 2035 (PKL), 1991 U.S. Dist. LEXIS 9230, at *1 (S.D.N.Y. June 10, 1991) (discovery ordered in securities fraud action to ensure defendants were not "dissipating the partnership assets").

The Outside Directors cloak their request for a protective order with phrases including "personal financial circumstances," "plainly private," "valid privacy interests," "right to privacy," "privacy issues," "infringes ... valid privacy interests," "serious privacy concerns," "interest in financial privacy," and "privacy principles." Motion at 7-10. Absent from this rhetoric is any articulable harm or specific injury that will befall movants if telephone numbers, e-mail addresses, account numbers, Enron-related income tax returns and similar information is submitted to the depository but shielded from public view, which Lead Plaintiff agrees to do. The Outside Director's Motion simply does not make the case because they have "presented no reasonable basis to suspect that any confidentiality obligation will be breached." *Advocacy Inc. v. Tarrant County Hosp. Dist.*, No. 4:01CV-062-BE, 2001 U.S. Dist. LEXIS 16676, at *17-*18 (N.D. Tex. Oct. 11, 2001).

The Outside Directors argue Rule 26 does not ordinarily permit discovery of a defendants' financial "status" or "ability" to satisfy a judgment. Motion at 7. Plaintiffs do not seek information concerning the Outside Directors' financial "status." And the Outside Directors' authority does not

square with the facts of this case. *Cockrum v. Johnson*, 917 F. Supp. 479, 482 (E.D. Tex. 1996), is a *habeas corpus* case in which a prisoner sought to preclude discovery of a letter he wrote to his daughter. *Habeas corpus* and discovery of a felon's letters have nothing to do with the Outside Directors' illicit payoffs, abdication of their fiduciary duties, and affirmative good faith and due care defenses. Similarly, in *De Masi v. Weiss*, 669 F.2d 114, 119 (3d Cir. 1982), the Third Circuit noted the plaintiffs' discovery in that case "intrude[d] into the personal finances of 97 non-party witnesses" as well as defendants, and the Third Circuit went on to state that privacy expectations are not the same when "statute or regulation may require publication of annual compensation." Here, Lead Plaintiff's discovery is directed only at named defendants. Accordingly, bank, securities, brokerage and similar financial account information is relevant and should be produced.

2. Enron-Related Income Tax Information Should Be Produced

"Tax returns are not privileged." *FDIC v. LeGrand*, 43 F.3d 163, 172 (5th Cir. 1995). The Outside Directors' returns are discoverable so long as they are relevant to this litigation. *Halperin v. Berlandi*, 114 F.R.D. 8, 11 (D. Mass. 1986) ("[t]ax returns are subject to discovery as long as they are relevant to the subject matter of the action"); *Powell v. Merrimack Mut. Fire Ins. Co.*, 80 F.R.D. 431, 433 (N.D. Ga. 1978) (compelling production of tax returns, W-2 forms and other IRS documents because they were "relevant").

Here, the Outside Directors' own Affirmative Defenses make their income tax returns relevant. Their Thirteenth Affirmative Defense alleges, "Plaintiffs' claims are barred because the Outside Directors at all times acted with reasonable care and diligence with respect to the matters Plaintiffs now contend were misrepresented by, or omitted from, Enron's public filings and public statements." Answer at 28. Their Thirtieth Affirmative Defense adds, "Plaintiffs' claims under Section 15 are also barred because the Outside Directors acted in good faith." *Id.* at 31. Plaintiffs believe the income the Outside Directors received from Enron and Enron-related entities – especially if not disclosed – will undermine their good faith defense in the eyes of a jury. Substantial monies flowing from Enron, any Enron-related entities, or from any other defendant in this case, will raise serious questions as to the credibility of these defenses. The significance of such monies is heightened if they were concealed from the public. Federal Rule of Civil Procedure 26(b)(1)

expressly provides that "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or *defense* of any party." *See also Hickman*, 329 U.S. at 511 (documents that might be used for impeachment are discoverable).

Insofar as the Outside Directors' tax returns contain information about income unrelated to Enron or to this litigation, Lead Plaintiff agrees it may be redacted. As limited, the tax returns are relevant to the inquiry and defenses in this case and therefore should be produced.

Citing the Fifth Circuit's decision in *Natural Gas Pipeline Co. v. Energy Gathering*, 2 F.3d 1397 (5th Cir. 1993), the Outside Directors claim the "Fifth Circuit, in particular, has refused to permit discovery of tax returns." Motion at 11. But *Natural Gas* involved the validity of a sanctions order, not a motion for protective order or a motion to compel production of documents. 2 F.3d at 1411. In *Natural Gas* the "district judge ordered a [non-party] to produce his tax returns *sua sponte*," though the plaintiffs "had never included them in their discovery requests, a fact that suggests that the returns were believed inaccessible or irrelevant." *Id.* at 1410-11. And unlike here, where the tax returns are relevant to the Outside Directors' affirmative defenses, in *Natural Gas*, the Fifth Circuit found the district court had merely "engaged in a fishing expedition." *Id.* *Natural Gas* does not advance the Outside Directors' argument.

3. E-mail Accounts, Home Addresses, Telephone Numbers and Social Security Numbers Are Relevant and Should Be Produced

The Outside Directors request the Court to conceal the who, when, where, and how of their Enron communications outside the office. Motion at 12-14. By concealing their personal e-mail addresses, telephone numbers and home addresses, they would prevent discovery of the true nature and extent of their participation in the Enron fraud.

As the Court recognized, Lead Plaintiff alleges Enron personnel openly joked about Enron's fraudulent accounting, "including at company parties," *i.e.*, outside the office. April 22, 2003 Order at 7. If one director received telephone calls and e-mails at home from another defendant concerning Enron, or if a director sent e-mails from a personal e-mail account to another director about Enron matters, that information is relevant. If the Outside Directors were receiving letters or electronic messages from Enron executives or any other defendant about persistent rumors of accounting fraud,

and received these letters or messages using P.O. Boxes or multiple e-mail accounts to conceal their identity, that information is relevant. But absent the production of phone numbers, addresses and e-mail accounts, Lead Plaintiff will not be able to discern this crucial information.

Earlier this year the Southern District of New York ordered a defendant accounting firm to provide **home address and telephone numbers** of **all** current and **former** employees who participated in audits of a defendant company. *In re Livent, Inc. Noteholders Sec. Litig.*, No. 98 Civ. 7161, 2003 WL 23254, at *3 (S.D.N.Y. Jan. 2, 2003). If former audit participants' home addresses and telephone numbers can be disclosed, certainly the directors of Enron can be compelled to provide similar information. *Accord Great West Life Assurance Co. v. Levithan*, 152 F.R.D. 494, 497 (E.D. Pa. 1994) (where plaintiff sought discovery of sham transactions, "[t]elephone records were discoverable in that they might show [defendant] was making business-related telephone calls"). *See generally United States v. Bryan*, 339 U.S. 323, 331 (1950) ("For more than three centuries it has now been recognized as a fundamental maxim that the public ... has a right to every man's evidence ... any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.").

Contrary to the Outside Director's privacy hysterics, Lead Plaintiff's discovery, concomitant with its agreement to treat contact information confidentially, will not harm movants. Indeed, while movants complain Lead Plaintiff's discovery will inevitably results in privacy invasions, certain of the Outside Directors home addresses and phone numbers are **already publicly disclosed** in SEC filings or are freely available using public Internet search engines and telephone directories.

Name	Address and Phone	Public Information Source
Charles A. LeMaistre	7 Bristol Green San Antonio, TX 78209 (210) 822-7649	1/17/02 Northern Border Partners Sched. 13D Switchboard.com 411 Information
Joe H. Foy	404 Highridge Drive Kerrville, TX (830)257-6116	10/8/99 Inland Resources, Inc. Sched. 13D Switchboard.com 411 Information
Herbert S. Winokur, Jr.	341 North Street Greenwich, CT 06830 (203) 661-0354	2002 ICC Directory for VRoom Limited 411 Information

John H. Duncan	5315 Longmont Drive Houston, TX (713) 840-0098	Switchboard.com 411 Information
Robert K. Jaedicke	8799 Cottonwood Bozeman, Montana 59718 (406) 522-5470	1/17/02 Northern Border Partners Sched. 13D 411 Information
Norman P. Blake	11179 Estancia Way Carmel, IN 46032 (317) 815-9596	Comdisco Inc. 10Q exhibit 10.10 Amended and Restated Employment Agreement between Norman P. Blake and Comdisco, Inc. Filed 8/14/01. 411 Information
Jerome J. Meyer	9290 East Thompson Peak, Unit 109 Scottsdale, AZ 85255 (480) 538-8201	Switchboard.com – Under Jerry Meyer 411 Information
John Mendelsohn	1412 South Boulevard Houston, TX 77006 (713) 521-4686	Switchboard.com 411 Information
Frank Savage	87 Ridgecrest Road Stamford, CT 06903 (203) 968-2327	Switchboard.com 411 Information
Charls E. Walker	10120 Chapel Road Potomac, MD 20854 (301) 299-5414	Switchboard.com 411 Information

Because the information movants seek to protect is already publicly available, this calls into serious question both the necessity for a protective order and the motivation of the Outside Directors in seeking one.

The Outside Directors cite no authority to permit them to conceal their e-mail addresses. Courts recognize robust electronic discovery is vital to the discovery process and must be produced to requesting parties. *See, e.g., Playboy Enters. v. Welles*, 60 F. Supp. 2d 1050, 1053 (S.D. Cal. 1999) (noting the liberality of the discovery rules, stating "information stored in computer format is discoverable," and ordering the production of e-mail and ordering access to defendants' hard drive to make mirror image of all information contained therein); *Credentials Plus, LLC v. Calderone*, 230 F. Supp. 2d 890, 906 (S.D. Ind. 2002) (creation and existence of surreptitious e-mail address was legitimate jury evidence precluding summary judgment); *Perry v. FTData, Inc.*, 198 F. Supp. 2d 699, 703 (D. Md. 2002) (company executive created anonymous internet e-mail address, or "Hotmail" account, to perpetuate sexual harassment without detection); *Linnen v. A.H. Robbins Co., Inc.*,

No. 97-2307, 1999 WL 462015, at *6 (Mass. Super. Ct. June 16, 1999) ("A discovery request aimed at the production of records retained in some electronic form is no different, in principle, from a request for documents contained in an office file cabinet.").

Similarly, social security numbers should be disclosed to ensure Lead Plaintiff can properly identify, for example, bank, stock or brokerage account ownership, offshore accounts, wire transfers, or instances in which a defendants' social security number is an identifying piece of information within a document. Due to the myriad financial entanglements of the Outside Directors and the high likelihood of multiple accounts, disclosure of social security numbers into the document depository is appropriate. *See, e.g., EEOC v. Carrols Corp.*, No. 5:98-CV-1772 (FJS), 2003 WL 1877768, at *8 (N.D.N.Y. Feb. 18, 2003) (ordering disclosure of social security numbers, salary and benefit information from employer database to "correctly identify employees").

The Outside Directors rely on *Scaife v. Boenne*, 191 F.R.D. 590 (N.D. Ind. 2000), for the proposition social security numbers and home addresses may be concealed. But in *Scaife*, a plaintiff arrestee sought the home addresses, social security numbers and number of children of *police officers*. Two other cases, *Doe v. White*, No. 00 C 1928, 2001 WL 649536 (N.D. Ill. June 8, 2001) and *Ferguson v. New York*, No. 97 Civ. 1169(SAS), 1997 WL 580689 (S.D.N.Y. Sept. 18, 1997), also concerned a police officer and corrections officer, respectively. And in *Savitt v. Vacco*, No. 95-CV-1842, 1996 WL 663888, (N.D.N.Y. Nov. 8, 1996), the court issued an order protecting the resumes of non-party assistant attorneys general. Enron's Outside Directors are not police officers or attorneys general. Movants' privacy can adequately be safeguarded through appropriate confidential treatment of their contact information.

4. Enron-Related Telephone Calls Should Be Produced

Movants request the Court to prevent the disclosure of "personal" telephone records unrelated to Enron, Motion at 14-15, but fail to indicate where plaintiffs have requested this information. In fact, plaintiffs do not seek, and are uninterested, in the Outside Directors' personal phone calls wholly unrelated to Enron. But they should be ordered to produce in unredacted form records concerning Enron-related telephone calls and *all* telephone calls to or from any defendant or any defendants' employees, agents or representatives, even if, in their opinion, a telephone call was

"personal." Plaintiffs should not be forced to rely on any Outside Director's determination whether a particular telephone call to a defendant (or a defendant's employee or representative) was business or personal in nature. An accurate and complete production can be assured only if *all* such calls are produced without redaction.

C. The Outside Directors' Harassment "Evidence" Does Not Support Entry of a Protective Order

According to the Outside Directors, the public's interest in the Enron fraud and the "high profile nature of this case" demonstrate the need for a protective order. Motion at 14. The Outside Directors' purported evidence of "harassment" shows otherwise. They claim "at least two" movants received "a number" of harassing e-mails at an "employer-owned email server," *i.e.*, at work. Motion at 4, 14. Presumably, if any other movants were subject to harassment, they would have submitted evidence to the Court. But 14 movants fail to claim, let alone provide evidence of, *any* harassment whatsoever – hardly the specific, particularized showing required by the Court and the Fifth Circuit for a protective order. And there is *no evidence whatsoever* that any of them have been harassed outside the office or at home – no police reports, no harassing telephone calls or e-mails at home, no affidavits concerning improper behavior by the public, *nothing* even remotely suggesting harassment outside the workplace.

Even more significantly, there is *no* showing that confidential treatment of e-mail accounts, social security numbers, telephone numbers and home addresses (which already are publicly disclosed) and similar information is insufficient to guard against harassing conduct. These combined failures fall woefully short of the Court's and the Fifth Circuit's requirements for a protective order.

IV. CONCLUSION

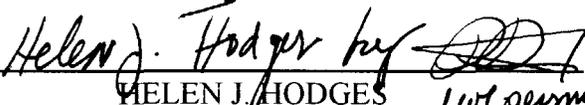
Through their conduct and their good faith and due care defenses, the Outside Directors' Enron-related financial and contact information is both relevant and in issue. Plaintiffs agree to treat as confidential personal contact and financial information. Because no more is required to protect movants from harassment, the Court should deny the Outside Directors' request for a protective order.

If any protective order is to be permitted, Lead Plaintiff respectfully requests the Court issue a narrow directive providing for the confidential treatment of personal information, similar to the orders issued by the Southern District of Texas and the Court on July 22, 2002 and March 28, 2003, respectively.

DATED: May 27, 2003

Respectfully submitted,

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
WILLIAM S. LERACH
DARREN J. ROBBINS
HELEN J. HODGES
BYRON S. GEORGIU
G. PAUL HOWES
JAMES I. JACONETTE
MICHELLE M. CICCARELLI
JAMES R. HAIL
JOHN A. LOWTHER
ALEXANDRA S. BERNAY
MATTHEW P. SIBEN
ROBERT R. HENSSLER, JR.


HELEN J. HODGES (w/ permission)

401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
STEVEN G. SCHULMAN
One Pennsylvania Plaza
New York, NY 10119-1065
Telephone: 212/594-5300

Lead Counsel for Plaintiffs

SCHWARTZ, JUNELL, CAMPBELL
& OATHOUT, LLP


ROGER B. GREENBERG
State Bar No. 08390000
Federal I.D. No. 3932
Two Houston Center
909 Fannin, Suite 2000
Houston, TX 77010
Telephone: 713/752-0017

HOEFFNER & BILEK, LLP
THOMAS E. BILEK
Federal Bar No. 9338
State Bar No. 02313525
440 Louisiana, Suite 720
Houston, TX 77002
Telephone: 713/227-7720

Attorneys in Charge

BERGER & MONTAGUE, P.C.
SHERRIE R. SAVETT
1622 Locust Street
Philadelphia, PA 19103
Telephone: 215/875-3000

Attorneys for Staro Asset Management

WOLF POPPER LLP
ROBERT C. FINKEL
845 Third Avenue
New York, NY 10022
Telephone: 212/759-4600

SHAPIRO HABER & URMY LLP
THOMAS G. SHAPIRO
75 State Street
Boston, MA 02109
Telephone: 617/439-3939

Attorneys for Nathaniel Pulsifer

SCOTT & SCOTT, LLC
DAVID R. SCOTT
NEIL ROTHSTEIN
S. EDWARD SARSKAS
108 Norwich Avenue
Colchester, CT 06415
Telephone: 860/537-3818

**Attorneys for the Archdiocese of Milwaukee
Supporting Fund, Inc.**

THE CUNEO LAW GROUP, P.C.
JONATHAN W. CUNEO
MICHAEL G. LENETT
317 Massachusetts Avenue, N.E.
Suite 300
Washington, D.C. 20002
Telephone: 202/789-3960

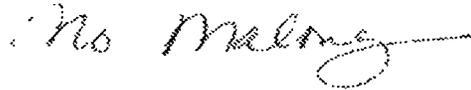
Washington Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE OUTSIDE DIRECTOR DEFENDANTS' MOTION FOR PROTECTIVE ORDER has been served by sending a copy via electronic mail to serve@ESL3624.com on this 27th day of May, 2003.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE OUTSIDE DIRECTOR DEFENDANTS' MOTION FOR PROTECTIVE ORDER has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 27th day of May, 2003.

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
New York, NY 10004



Mo Maloney

The Exhibit(s) May

Be Viewed in the

Office of the Clerk